of express legislature authority;[1] and corporations invested therewith cannot, without express legislative authority, lease, sell, transfer, or otherwise dispose of such right.[2] It is by virtue of an Act of Assembly, or its charter, that a railroad company can mortgage its franchises.[3]

THE LIMITATIONS UPON THE EXERCISE OF THE RIGHT OF EMINENT DOMAIN.

These are two:

I. The taking must be for a public purpose.

II. Compensation must be made.

I. THE TAKING MUST BE FOR A PUBLIC PURPOSE.

The use must be a public one, and the property taken must be actually used for a public purpose, or for one benefiting the public, mediately or immediately. All citizens may not be benefited alike, as the use may necessarily be a local one—a park, for instance, or a highway may be of advantage only to those in a particular locality; but the people in general are nevertheless interested therein, and have equal rights to the use thereof. While the benefit need not be universal, all people in similar circumstances must share therein, and not merely individuals of a certain class. The fact that a citizen has no children to educate does not make schools any the less public uses.[4] Without public interest for its basis, the exercise of the right of eminent domain would amount to confiscation and usurpation. A mere taking is insufficient; there must be an ultimate use, and in precise accordance with

[1] *Phillips* v. *Dunkirk, Warren and Pittsburg R. R. Co.*, 78 Pa. 177, 181; *Stormfeltz* v. *Manor Turnpike Co.*, 13 id 555.

[2] *Pittsburg & Connellsville R. R. Co.* v. *Bedford & Bridgeport R. R. Co.* 32 P. F. Smith, 104; *Barker v. Hartman Steel Co.*, 129 Pa. 551.

[3] *Commonwealth* v. *Susquehanna & Delaware River R. R. Co.*, 122 Pa., 306; S. C. 22 W. N. C., 413, 415; 24 id. 81; *Gloninger* v. *Pittsburgh & Connellsville R. R. Co.*, 27 id. 497, 499; 139 Pa., 13; *Fidelity Co.* v. *West Penn. etc., R. R. Co.*, 138 Pa., 494.

[4] 1 Hare's Am. Const. Law, p. 337; *Kelly* v. *City of Pittsburgh*, 85 Pa. 170, 178; per Gordon, J. See *Long* v. *Fuller*, 68 id. 170.

the purposes which justified the taking, and for such only. Thus a railroad company cannot construct buildings or erect machinery, not necessarily connected with the use of its franchise, within the limits of its right of way. Being in derogation of private right, the authority conferred must be strictly construed, and does not exist without an express grant.[1]

1. *What is a public use?*

Toward the accomplishment of results for which governments are instituted—the protection of the people and the promotion of the general welfare—the right of eminent domain is appropriate. The necessary structures required for the various purposes of the government, including custom-houses, court houses, post offices, navy yards, fortifications and other essentials to the security of life and property; public schools, parks, highways, acqueducts—are all of them public uses. So are railroads, canals and turnpikes. Land, (including streets and highways), may be occupied for the conveyance of water, gas, steam and electricity to the public. Bodies of water can be taken to supply the people with that needed element, and land appropriated for the construction thereon of the necessary reservoirs and acqueducts. Likewise, a dam may be constructed to improve the navigation of a stream for the purposes of irrigation, though the benefit in the latter instance, as in the case of supplying a grist mill with water power, is directly confined to but a few, and the lands of others may be overflowed.[2] In *Bennett's Branch Improvement Company's Appeal*,[3] an Act incorporating the appellant for the purpose of improving a stream which was a public highway, and authorizing the collection of toll, was declared constitutional; the improvement was for the use of the public as a highway.[4] THOMPSON, C. J., said: "Individual inconveniences must yield to the wants of the whole public.

[1] *Lance's Appeal*, 55 Pa., 16, 25.

[2] 1 Hare's Am. Const. Law, p. 339, *et seq.*; *In re League Island*, 1 Brewster, 524; *Long* v. *Fuller*, 68 Pa., 170; *Darlington* v. *United States*, 82 Pa., 382; *Kohl* v. *United States*, 91 U. S., 367.

[3] 65 Pa., 242.

[4] See *Smedley vs. Erwin*, 51 Pa. 445.

In most of these cases of improved navigation by companies, or the state, if not all, individuals have always been found who would claim to be as well off without such improvements as with them, and yet they are obliged to pass over them with their property, and pay tolls. There is no reason in this for impeaching the validity of the law. This results from the accidency of location, and of this nobody is to blame but the owner, and he must submit to all legal consequences incident thereto." This language was approvingly quoted by GREEN, J. in the recent case of *Genesee Fork Improvement Co.* v. *Ives* [1] (decided October 5, 1891) which decided that where a corporation is invested with the right to take possession of a stream and improve it and charge tolls for lumber floated upon it, its right to exercise the franchise and collect the tolls allowed by the Act of incorporation cannot be defeated by objections which deny the necessity of the franchise or call in question the degree of perfection in the improvements made by the company; and the fact that it was possible to float logs on the natural state of the water is no reason that the company may not claim the fruits of its franchise.

In *Palairet's Appeal*,[2] the Act of April 15, 1869, for the extinguishment of irredeemable ground rents was sought to be sustained as a valid exercise of the right of eminent domain, on the ground of public policy, which "has always been to encourage the free transmission of real estate, and to remove restrictions on alienation." But the Act, though providing for compensation, was held unconstitutional, as amounting to a taking of property for *private* use.

In some instances land may be taken for a private road, as where a landowner lays out a road upon intervening land for the purpose of reaching a public highway. But in such cases the public is said to be benefited because of the advantages a closer communication affords.[3] Analogous to the case last cited establishing the constitutionality of the Act of June 13, 1836, which authorizes the laying out of private roads, are those cases

[1] 29 W. N. C. 109, 112.

[2] 67 Pa., 479, 488, *et seq.*

[3] *Pocopson Road*, 16 Pa., 15; 1 Hare's Am. Const. Law, p. 344.

sustaining the constitutionality of the Lateral Railroad Act of May 5, 1832, and its various supplements. [1] In both instances the public have an implied right or license to use the roads for the purposes for which they were intended.[2] But it is essential that the private road, or lateral railroad, connect with some public highway, affording means for the public to use the road. Thus in *Waddell's Appeal*,[3] the Act of June 13, 1874, providing "for a right of way across or under the rivers or other streams of this commonwealth, for the better and more convenient mining of anthracite coal" was held to amount to an authorization of the taking of private property for private use, and was declared unconstitutional.[4]

The meaning of the words "public use" has been recently (May, 1891,) explained, fully and ably, by THAYER, P. J., of Common Pleas, No. 4, of Philadelphia, in *Twelfth Street Market Co.* v. *Philadelphia and Reading Terminal R. R. Co.*[5] He says, and his opinion was adopted as that of the Supreme Court,—"Now the meaning of these words, 'for public use,' has been frequently determined in the cases in which the question of the validity of the grant of the right of eminent domain has arisen, where it was necessary to decide whether the purpose for which the property was to be taken was for 'public use.' Clearly the words do not mean that every use is a public use, from which the public may incidentally and temporarily derive an advantage or benefit or convenience, during the pleasure of the owner of the property, and from which they may be excluded at the mere caprice of the owner. If this definition were accepted, any man's property might be taken upon the shallowest pretence of a public use. The test whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right

[1] *Harvey vs. Thomas*, 10 Watts 63; *Harvey vs. Lloyd*, 3 Pa. 331; *Shoenberger vs. Mulhollan*. 8 id.. 134; *Hays vs. Risher*, 32 id. 169; *Brown vs. Corey*, 43 id. 495; *Keeling vs. Griffin*, 56 id. 305.

[2] *Palairet's Appeal*, 67 Pa. 479, 492; per SHARSWOOD, J.

[3] 84 Pa. 90.

[4] See *Edgewood R. R. Co.'s Appeal*, 79 Pa. 257, 269.

[5] 28 W. N. C. 111, 113, 114; 142 Pa. 580, 586.

to the use, which cannot be gainsaid or denied, or withdrawn at the pleasure of the owner. A particular enterprise palpably for private advantage, will not become a public use because of the theoretical right of the public to use it. The question is, whether the public have a right to the use. The general public must have a definite and fixed use of the property, a use independent of the will of the private person or corporation in whom the title is vested—a public use which cannot be defeated by the private owner, but which is guarded and controlled by the law. The true criterion by which to judge of the character of the use is whether the public may enjoy it by right, or only by possession. The test is not what the corporation owning the land may choose to do, but what, under the law, it *must* do, and whether a public trust is impressed on the land. A franchise for such a public use cannot be granted away. The question of a public use is not affected by the agency employed. It is no more of a public use for being held by a corporation. To constitute a public use the property must be under the control of the public, or of public agencies, or the public must have a right to the use."

In the first instance the Legislature decides whether the use is public. "As a general rule it rests in the wisdom of the Legislature to determine what is a public use, and also the necessity of taking the property of an individual for that purpose."[1] The Courts, however, will ultimately determine the question, declaring the Act unconstitutional if the use is not a public one; but they leave the question of expediency solely to the legislative discretion.[2] The Legislature controls the mode of taking private property for public use, subject to the limitations prescribed by the Constitution.[3]

2. *What may be taken?*

It may be safely said that all species of property, corporeal and incorporeal, may be appropriated by virtue of the right

[1] *Mayor etc. of Pittsburgh* v. *Scott*, 1 Pa., 309, 314; per ROGERS, J.; *Smedley* v. *Erwin*, 51 id., 445, 451.

[2] *Palairet's Appeal*, 67 Pa., 479, 488; *Darlington* v. *United States*, 82 id. 382, 386; 1 Hare's Am. Const. Law, pp. 345, 346.

[3] *Bachler's Appeal*, 90 Pa., 207.

of eminent domain.[1] As said by SHARSWOOD, J. in *Hammett* v. *Philadelphia*,[2] "there may be occasions in which money may be taken by the state in the exercise of its transcendental right of eminent domain. Such would be the case of a pressing and immediate necessity, as in the event of invasion by a public enemy, or some great calamity, as famine or pestilence, contributions could be levied on banks, corporations or individuals. The obligation of compensation is not immediate. It is required only that provision should be made for compensation in the future. Judge RUGGLES confines the right to exact money by virtue of the eminent domain, to the case where it is for the use of the state at large in time of war. I cannot see that there is any such necessary limitation. The public necessity which gives rise to it prevents its being restrained by any limitations as to either subject or occasion."

Like any other species of property, corporate franchises may be taken by the Commonwealth, or any one to whom the Commonwealth has delegated its power of eminent domain. Section 3 of Article XVI of the Constitution of Pennsylvania provides that, "The exercise of the right of eminent domain shall never be abridged, or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals." In *Twelfth Street Market Co.* v. *Philadelphia and Reading Terminal R. R. Co.*,[3] THAYER, P. J. (whose opinion, on appeal, was adopted as the opinion of the Supreme Court) says: "It is too well settled to admit of debate that under the right of eminent domain not only the lands of a corporation may be taken for such a public use as a railroad company, but their franchise also. It would be a mere affectation of industry for me to parade the many cases decided in Pennsylvania and the other States of the Union which affirm this proposition, especially in view of the express words of the Constitution already quoted, which

[1] *City of Reading* v. *Althouse*, 93 Pa., 400; *Lycoming Gas & Water Co.* v. *Moyer*, 99, id., 615, 619.

[2] 65 Pa., 146, 152-3.

[3] 28 W. N. C. 111, 113; 142 Pa. 580, 585.

subject all franchises, as well as other property of corporations, to the exercise of this right."

The taking of corporate franchises in the exercise of the right of eminent domain is no interference with the inviolability of contracts, which are made subject to the paramount right of eminent domain and must yield to its exercise. The compensation required for its infringement is a recognition of the contract obligation, and no impairment of it.[1] Thus a bridge of a corporation can be taken for public use and made a free bridge.[2]

But property already devoted to public use cannot be taken by eminent domain for other public uses without express legislative authority, or by necessary implication. In *Pennsylvania R. R. Company's Appeal*,[3] GORDON, J. said: "It is true that a franchise is property, and, as such, may be taken by a coporation having the right of eminent domain; but in favor of such right there can be no implication unless it arises from a necessity so absolute that, without it, the grant itself will be defeated. It must also be a necessity that arises from the very nature of things, over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy."[4] In *Pittsburgh Junction R. R. Company's Appeal*,[5] PAXSON, J. says: "The principle is well settled that 'the lands or right of way occupied by one railroad company for its corporate purposes cannot be taken as right of way by another railroad company, except for mere crossings, and then only for crossing purposes, and not for exclusive occupancy.' This rule is not confined to the track or right of way of the company, but also to the grounds occupied by all the appliances necessary

[1] *In re Opening of Twenty-second Street*, 102 Pa., 108; *Philadelphia & Gray's Ferry, Pass. Rwy. Co.'s Appeal*, id., 123.

[2] *In re Towanda Bridge Co.*, 91 Pa., 216.

[3] 93 Pa., 150, 159.

[4] See, also, *Pittsburgh Junction R. R. Co.*'s Appeal, 122 Pa., 511; *Sharon Rwy. Co.'s Appeal*, id., 533; *Groff's Appeal*, 128 id., 621; 29 W. N. C. 138; *Twelfth Street Market Co.* v. *Philadelphia and Reading Terminal R. R. Co.*, 28 W. N. C. 111, 113; 142 Pa. 580, 586; *Penn. R. R. Co.*, v. *Phila. Belt Line R. R. Co.*, 29 W. N. C. 202.

[5] 122 Pa, 511, 529, 530.

for the successful operation of the road."[1] In *Tyrone Township School District's Appeal*,[2] it was decided that school directors could not take land, used for the care and support of the poor, on which to erect a school house.

A public street or highway cannot be taken by a corporation invested with the right of eminent domain without express legislative authority. The highways in the State are public franchises—the property of the people at large and not of a particular district. The legislature, representing the people in their sovereign capacity, has, therefore, absolute direction and control over them. A municipality may make regulations for corporate purposes, for instance, as to grading, curbing and paving the streets within its limits; but its authority is subject to that of the State in respect of its more general and extended uses.[3] The authorities are overwhelming that railroad and other corporations and individuals invested with the right of eminent domain have no rights in the public highways except such as are given them expressly, or by necessary implication, by some Act of Assembly, or conceded by a municipality by virtue of a delegation to it by the state of the sovereign power over the highways. The authority of the Philadelphia and Trenton Railroad case has remained unshaken.[4]

Although, as said by BLACK, C. J., in *Commonwealth* v. *Erie and N. E. R. R. Co.*,[5] the "conversion of a public street to purposes for which it was not originally designed, does operate severely upon a portion of the people, the injury must

[1] See, also, *Sharon Rwy. Co.'s Appeal*, 122 Pa., 533.

[2] 22 W. N. C., 513.

[3] *Phila. & Trenton R. R. Case*, 6 Wharton, 25, 44, 45; per GIBSON, C. J.

[4] See *Mifflin* v. *R. R. Co.*, 16 Pa. 182; *Mercer* v. *Pittsburgh, Fort Wayne and Chicago R. R. Co.*, 36 id. 99; *Danville, Hazelton & Wilkesbarre R. R. Co.* v. *Commonwealth*, 73 id. 29; *Cake* v. *Phila. & Erie R. R. Co.*, 87 id. 307; 6 W. N. C. 151; *Penna. R. R. Co's Appeal*, 93 Pa. 150; *Penna. R. R. Co's Appeal*, 115 id. 514; *Attorney-General* v. *Lombard & South Streets Passenger Rwy. Co.*, 1 W. N. C. 489; *Philada. & Reading R. R. Co's Appeal*, 16 id. 165; *City of Philadelphia* v. *Phila. & Reading R. R. Co.*, 25 id. 320, 323, per THAYER, P. J; *Penna. R. R. Co.*, v. *Phila. Belt Line R. R. Co.* 29 W. N. C.; *Twelfth St. Market Co.*, v. *Phila. & Reading Terminal Co.*, 142 Pa. 580.

[5] 27 Pa. 339, 354.

be borne for the sake of the far greater good which results to the public from the cheap, easy and rapid conveyance of persons and property by railway. The commerce of a nation must not be stopped or impeded for the convenience of a neighborhood. But we can say this only in cases where the authority has been given by the sovereign power of the State. That any private individual or incorporated company, not empowered to do so by an Act of the Legislature, can take possession of a street and make a railroad upon it without being guilty of a criminal offence, is a proposition which I am sure no lawyer would dream of making. The right of a company, therefore, to build a railroad on the street of a city, depends, like the lawfulness of all its other acts, upon the terms of its charter. Of course, when the power is given in express words, there can be no dispute about it, It may also be given by implication."' And where it is given, the municipal authorities have no right to object or interfere, and their consent is unnecessary.[1]

The Act of May 29, 1885, invests natural gas companies with the power of eminent domain (which they did not possess under the Corporation Act of May 29, 1874[2]), and all powers and privileges necessary to the convenient and successful prosecution of their business. A municipality may give or withhold its consent to the occupation of its highways by such company, but cannot couple its assent with conditions not contained in the Act.[3] Municipal consent is essential to the grant of exclusive privileges to an electric light company claiming the same under the Act of 1874.[4]

In *Williamsport Pass. Rwy. Company's Appeal*,[5] the charter of the company, granted in 1863, authorized it to construct a railway on certain streets in the city of Williamsport,

[1] *Borough of Millvale* v. *Evergreen Rwy. Co.*, 131 Pa. 1.

[2] *Sterling's Appeal*, 111 Pa. 35; *Emerson* v. *Commonwealth*, 108 id. 111.

[3] *Appeal of the City of Pittsburgh*, 115 Pa., 4; *Carothers* v. *Phila. Co.*, 118 id. 468; *Penn Gas Coal Co.* v. *Versailles Fuel Gas Co*, 131 id. 522, 532.

[4] *Electric Lighting Co.* v. *Underground El. Light & Power Co.*, 16 W. N. C. 407.

[5] 120 Pa. 1. See *Gloninger* v. *Pittsburgh & Connellsville R. R. Co.*, 27 W. N. C., 497, 500; 139 Pa. 13; per GREEN, J.

without the consent of the municipality; and it was held that the provisions of Article XVII, Section 9, of the Constitution of 1874, and of the Act of May 23, 1878, requiring local consent to the construction of passenger railways within city, borough or township limits,[1] had no effect on the company's charter, and it could extend its road without obtaining the consent of the municipal authorities, the constitutional provisions and Act of 1878 not operating to repeal or alter existing chartered rights.

If a railroad corporation is authorized to construct a railroad, by a straight line, between two designated points, that authority implies the right to run upon, along, or across all the streets or roads which lie in the course of such line. If the act of incorporation directs a road to be made between certain termini, and leaves the selection of the route to the discretion of the company, the road may be located on an intervening highway if in the judgment of the directors it be necessary or expedient to do so.[2] The Courts will not interfere, unless the company exceeds the discretion expressly given.[3] In *Groff's Appeal*,[4] it was decided, however, that a turnpike company incorporated under the General Corporation Act of 1874, whose charter specified the termini on points of a public road, but said nothing as to the intermediate route, could not appropriate for its road bed the highway already dedicated to public use. There was held to be no necessity for so doing, except to save the expense of acquiring a new route through private property, the charter neither expressly nor by implication giving the right claimed.[5]

[1] See *Larimer & Lincoln Street Rwy. Co.*, v. *Larimer Street Rwy. Co.*, 137 Pa. 533.

[2] *Commonwealth* v. *Erie & N. E. R. R. Co.*, 27 Pa., 339, 355; per BLACK, C. J.

[3] *Struthers* v. *Dunkirk, Warren & Pittsburgh Rwy. Co.*, 87 Pa., 282; *Parke's Appeal*, 64 id. 137; *N. Y. & Erie R. R. Co.* v. *Young*, 33 id. 175; *Cleveland & Pittsburgh R. R. Co.* v. *Speer*, 56 id. 325; *Jutte* v. *Keystone Bridge Co.*, 29 W. N. C. 169, decided Jan. 4, 1892.

[4] 128 Pa., 621.

[5] See *Penna. R. R. Co.* v. *Phila. Belt Line R. R. Co.*, 29 W. N. C.; *Pittsburgh Junct. R. R. Co.* v. *Allegheny Valley R. R. Co.*, id.

The grant of a right of way implies the right to construct whatever is essential to the operation of a railroad; for example, switches, turnouts, sidings, and necessary structures.[1] So where the Legislature confers upon a railroad corporation the power to construct branches, it may occupy the public highways as necessary to the exercise of the right so given; and the selection is discretionary with the directors of the corporation.[2] In *Western Pennsylvania R. R. Company's Appeal*,[3] it was held that where its charter authorized the construction of a railroad from a city to another point outside, the company could construct its road from any point within the city. In *Vollmer's Appeal*,[4] it was decided that a railroad company, possessing the branching power, could construct a branch line double the length of its main line, the latter being three miles long. In the pending litigation of the "Reading Terminal Railroad,"[5] it was argued that the defendant had the right to build the elevated road, and cross the streets of the city, without obtaining the city's consent, by virtue of its branching power, from which, as a consequence, flows the right to *cross* any highway in the State; but it was held that since the Acts of June 9, 1874, (P. L. 282), and May 31, 1887, (P. L. 275), the consent of the municipality must be obtained.

Where authority is given a railroad company to change the site of any public highway whenever it deems necessary, its decision is conclusive, if the power is not abused. The necessity need not only arise from a longitudinal occupation

[1] *Getz's Appeal*, 10 W. N. C., 453; *Slocum's Appeal*, 12 id. 84; *Phila., Wilm. & Balto. R. R. Co.* v. *Williams*, 54 Pa., 103, 107, *Cleveland & Pittsburgh R. R. Co.* v. *Speer*, 56 id. 325, 335; *Black* v. *Phila. & Reading R. R. Co.*, 58 id. 249, 252.

[2] *Mayor, etc., of Pittsburgh* v. *Penna. R. R. Co.*, 48 Pa., 355; *Cleveland & Pittsburgh R. R. Co.* v. *Speer*, 56 id. 325; Western Penna. R. R. Co.'s Appeal, 99 id. 155; *McAboy's Appeal*, 107 id. 548, 557; *Penna. R. R. Co.* v. *Duncan*, 111 id. 352; *Penna. R. R. Co.'s Appeal*, 115 id. 514; *Vollmer's Appeal*, id. 166; *Penna. R. R. Co.'s Appeal*, 116 id. 55.

[3] 99 Pa., 155.

[4] 115 Pa., 166.

[5] *City of Philadelphia* v. *Phila. & Reading R. R. Co.*, 25 W. N. C., 320; now pending in the Supreme Court of Pennsylvania. *Parke's Appeal*, 64 Pa. 137.

of the highway, but may exist in the case of a crossing of the same.[1] The company, however, must reconstruct the highway within a reasonable time. On failure to do so, mandamus will lie to compel the reconstruction;[2] the company may be indicted for nuisance; or the municipality may reconstruct the road, and recover the cost from the company.[3] If in changing the line of a highway, a railroad company creates a necessity for a bridge, it is liable not only for the cost of its construction, but also for such repairs and reconstruction as the public needs require.[4] But if authority is given to cross streets, a railroad company is no trespasser, and the manner of crossing, resting in the sound discretion of the company, is not reviewable unless the discretion is abused.[5]

3. *What constitutes a taking.*

Anything may be said to amount to a taking which deprives the owner of the use, occupation or enjoyment of his property. It may be an entire or partial deprivation. But physical assumption, entry or occupation is not necessary, nor any change of condition. Thus where a railroad locates its route by survey, it is a taking and appropriation of the land, although the actual construction of the road is not commenced for several years afterward: and damages are recoverable not alone because of the location but also for the subsequent construction.[6] *In re District of the City of Pittsburgh*[7] it was held that the mere laying out of streets through one's

[1] *Penna. R. R. Co.'s Appeal*, 128 Pa., 509; *Appeal of Township of North Manheim*, 22 W. N. C., 149.

[2] *Pittsburgh, McKeesport & Youghiogheny R. R. Co.* v. *Commonwealth ex. rel., Attorney-General*, 104 Pa., 583; *Buffalo, N. Y. & P. R. R. Co.* v. *Commonwealth*, 120 id. 537.

[3] *Pitts., Va. & Charleston Rwy. Co.*, v. *Commonwealth*, 101 Pa., 192, 197; *Commonwealth* v. *Penna. R. R. Co.*, 117 id. 637.

[4] *Bean* v. *Howe*, 85 Pa., 260; *Penna. R. R. Co.* v. *Borough of Irwin*, id. 336.

[5] Appeal of the Borough of South Waverly, 20 W. N. C., 209.

[6] *Beale* v. *Penna. R. R. Co.*, 86 Pa., 509, 511; *Pitts., Va. & Charleston Rwy. Co.* v. *Commonwealth*, 101 id. 192; *Davis* v. *Titusville & Oil City Rwy. Co.*, 114 id. 308.

[7] *2 W. & S.*, 320.

property was no taking thereof; there must be an actual opening and application to public use. But, under the Act of 1855, a land-owner can recover compensation, though the street over his land has not been actually opened and damages have been assessed by viewers legally appointed.[1] But later statutory enactments have changed the law. In *Volkmar Street*[2] it was decided that until an act was done indicating that the possession of the owner was about to be disturbed, no right to have damages assessed accrued to him. In *Borough of Easton* v. *Rinek*[3] it was held that no damages were sustained until the street was actually opened. In *Brower* v. *City of Philadelphia*[4] it was held that the Act of April 28, 1870, "defining the line of Chestnut Street in the City of Philadelphia" did not constitute a present or actual appropriation of land, and the right of the land-owners to sue for damages does not accrue until the city actually enters upon the land in pursuance of the power given by the Act. These cases were approved in *In re Change of Grade of Plan*, 166,[5] where MITCHELL, J., held that the placing of a street upon the public plan is so far an interference with the rights of property that no buildings may thereafter be erected within the lines, and those so erected must be removed at the expense of the owner, and without damages being paid therefor when the street is opened; yet no right of action accrues until the actual opening.

In *Monongahela Nav. Co.* v. *Coons*,[6] a taking was define as an "assumption of possession"—and unless there was an actual taking, and not merely a deprivation of the use of property—as, for an example, a flooding of it by reason of the construction of a dam by a lower riparian owner—no

[1] *City of Philadelphia* v. *Dickson*, 38 Pa. 247; *Same* v. *Dyer*, 41 id. 463.

[2] 124 Pa. 320; see *Whitaker* v. *Borough of Phœnixville*, 28 W. N. C. 30: 141 Pa. 327.

[3] 116 Pa. 7.

[4] 28 W. N. C. 87, 142 Pa. 350.

[5] 28 W. N. C. 406, 409.

[6] *6 W. & S.*, 101, 114; per GIBSON, C. J.

damages were recoverable.[1] Although a lot owner owned to the middle of a highway, the location of a railroad thereon close to the line of his property, thereby lessening its value, was an injury for which no redress was obtainable, as no part of his property was *actually taken;* the public having a right of way thereon, and the company like use of the public highway.[2] But this was prior to the Constitution of 1874. In *Sharpless* v. *Mayor of Philadelphia*,[3] it was held that taxation is not a "taking" of property within the intendment of the Constitution. In *Monongahela Bridge Co.* v. *P. & B. Rwy. Co.*[4] the use of a private bridge by a railroad company, in accordance with an Act of Assembly, was held not to be such a taking under Article XVI, Section 8, of the present Constitution as to enable the bridge company to an appeal from the decree of the quarter sessions fixing tolls.

II. COMPENSATION MUST BE MADE.

The second requisite to the exercise of the right of eminent domain is that compensation must be made. This is an incident of the right, of long standing, and not in any way dependent on constitutional provisions, which merely give additional security. In his treatment of the subject, Puffendorf wrote: "It will be confessed agreeable to natural equity, that when contributions are to be made for the preservation of some particular thing, by persons that enjoy it in common, every man should pay his quota, and one should not be forced to bear more of the burthen than another. And the same holds to be equity also in Commonwealths; but because the state of a Commonwealth may often be such that either some pressing necessity will not give leave, that every particular subject's quota shall be collected, or else, that the public may be forced to want the use of something in the possession of some private subject; it must be allowed that the sovereign power may seize upon it, to answer

[1] *McKean* v. *Delaware Division Canal Co.*, 49 Pa., 424; *West Branch & Susquehanna Canal Co.* v. *Mulliner*, 68 id. 357.

[2] *Snyder* v. *Penna. R. R. Co.* 55 Pa., 340.

[3] 21 Pa., 147, 166-7, per BLACK, J.

[4] 114 Pa., 478.

the necessities of the State. But then all above the proportion that was due from the proprietors, is to be refunded to them by the rest of the subjects."[1]

The Federal and State Constitutions have adopted the principle of *Magna Charta* that no person shall be deprived of life, liberty or property, without due process of law.[2] These are the words of the Fifth Amendment, which also provides: "Nor shall private property be taken for public use without just compensation." The Fourteenth Amendment—an additional guarantee to the citizen—provides: "Nor shall any State deprive any person of life, liberty or property, without due process of law." The Constitution of Pennsylvania of 1874, declares: "Nor shall private property be taken or applied to public use without authority of law, and without just compensation being first made or secured."[3] "Nor can he be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land."[4]

In *Fetter* v. *Wilt*,[5] it is said: "'Judgment of his peers' is a term or expression borrowed from '*Magna Charta*,' and it means a trial *per pais*, or by the country, which is a trial by jury. The words, 'or of the law of the land,' have the same origin, and are to the same effect, as 'due process of law,' in the bill of rights in the Constitution of the United States, and it means judgment of law in its regular course of administration through courts of justice."[6]

The Constitution of Pennsylvania, adopted in 1790, contained the clause: "Nor shall any man's property be taken or applied to public use, without the consent of his representatives, and without just compensation being made."[7]

[1] *Law of Nature and Nations*, Bk. VIII., ch. 5, Sec. 7.

[2] *Palairet's Appeal*, 67 Pa., 479, 485-6.

[3] Art. I, Sec. 10.

[4] Art. I., Sec. 9.

[5] 46 Pa., 457, 460; per THOMPSON, J.

[6] See, also, *Ervine's Appeal*, 16 Pa., 256; *Penna. R. R. Co.* v. *First German Lutheran Congregation*, 53 id., 445; *Craig* v. *Kline*, 65 id., 399, 413; *Rutherford's Case*, 72 id., 82; *Philadelphia* v. *Scott*, 81 id., 80, 90; *People's Pass. Rwy. Co.* v. *Marshall St. Rwy. Co.*, 25 W. N. C., 318, 320.

[7] Art. IX., Sec. 10.

Under this section, in *Mayor, etc., of Pittsburgh* v. *Scott*,[1] it was held that "where private property is taken for public use, it is not necessary that the compensation should be actually ascertained and paid before the property is appropriated. It is sufficient, if an adequate remedy is provided, by which the individual can obtain compensation without any unreasonable delay."[2] But as said in Yost's Report,[3] the citizen was often deprived of the compensation which the Constitution secured to him by reason of the insolvency of the corporations or individuals taking his property by virtue of the right of eminent domain which they possessed. To remedy this evil, the Amendment of 1838 was passed, which provides: "The Legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property, or give adequate security therefor before such property shall be taken."[5]

This section requires that corporations or individuals must "*pay* or *secure* the price of the property *before* it is taken;" but it was held sufficient if the State in taking property should provide the *means* of payment at the passage of an Act.[4] The power of taxation which a State or municipality possesses is, ordinarily, sufficient security to the citizen whose property is taken by it; but where it is clearly shown that the power of taxation is inadequate within a reasonable time to pay the damages likely to be occasioned, the Court, on proper application, will prevent the appropriation of the property until adequate security is provided.[6]

Article XVI, Section 8, of the Constitution of Pennsylvania, adopted in 1873, contains this provision: "Municipal

[1] 1 Pa., 309, 314.

[2] *Commissioners of Kensington* v *Wood*, 10 Pa., 93, 97; *McClinton* v. *Pitts., Ft. Wayne & Phi. Rwy Co.*, 66 id., 404, 407.

[3] 17 Pa., 524, 531.

[4] Art. VII., Sec. 4.

[5] *Monongahela Nav. Co.* v. *Coons*, 6 W. & S., 101, 114; *Yost's Report*, 17 Pa., 524, 531; *McClinton* v. *Pitts., Ft. Wayne & Chi. Rwy Co.*, 66 *id.* 404, 408.

[6] *Keene* v. *Borough of Bristol*, 26 Pa., 46, 48; *Long* v. *Fuller*, 68 *id.* 170, 173.

and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction."

In the Constitution of 1790 and the Constitution of 1838, provision was made for the recovery of damages by him whose property was *taken* by the exercise of the right of eminent domain, and the Courts refused redress to all whose property was not actually taken. It did not matter how much was taken; though it were a small portion, the owner could recover compensation not only for what was appropriated, but also damages done to the remainder of the property. A neighbor might suffer greater injury, but could recover nothing unless something was taken. The word "taking" was "interpreted to mean, taking the property altogether; not a consequential injury to it which is no taking at all. For compensation of the latter, the citizen must depend on the forecast and justice of the Legislature."[1] If the Legislature made a corporation liable for consequential injuries, it could not evade the responsibility;[2] but where charters contained no such provision, redress was refused in every case.[3]

[1] *Phila. & Trenton R. R. Co.'s* Case, 6 Wharton, 25, 46; per GIBSON, C. J.

[2] *Lycoming Gas & Water Co.* v. *Moyer*, 99 Pa., 615; *Finn* v. *Providence Gas & Water Co.*, *id.* 631.

[3] *Shrunk* v. *Schuylkill Nav. Co.*, 14 S. & R., 71; *Phila. & Trenton R. R.* Case 6 Wharton, 45; *Monongahela Nav. Co.* v. *Coons*, 6 W & S., 101; 6 Pa. 379, 382; *Henry* v. *Pitts. & Allegheny Bridge Co.*, 8 W. & S., 85; *Susquehanna Canal Co.* v. *Wright*, 9 *id.* 9; *Mifflin* v. *R. R. Co.*, 16 Pa., 182, 193; *O'Connor* v. *Pittsburgh*, 18 *id.* 187; *Ceitenbaugh* v. *Chester Valley R. R. Co.*, 21 *id.* 100; *N. Y. & Erie R. R. Co.* v. *Young*, 33 *id.* 175; *Watson* v. *P. & R. R. R. Co.*, 37 Pa., 469, 479; *Buckwalter* v. *Black Rock Bridge Co.*, 38 *id.* 281, 286; *Clarke* v. *Birmingham & Pitts. Bridge Co.*, 41 *id.* 147; *Monongahela Bridge Co.* v. *Kirk*, 46 *id.* 112; *McKeen* v. *Delaware Division Canal Co.*, 49 *id.* 424, 440; *Cleveland & Pitts. R. R. Co.*, v. *Speer*, 56 *id.* 325; *Koch* v. *Williamsport Water Co.*, 65 *id.* 288; *Freeland* v. *Penna R. R. Co.*, 66 *id.* 91; *West Br. & Susq. Canal Co.* v. *Mulliner*, 68 *id.* 357, 360; *Bald Eagle Boom Co.* v. *Sanderson*, 32 P. F. Smith, 402; *New Castle & Franklin R. R. Co.* v. *McChesney*, 85 Pa., 522; *Struthers* v. *Dunkirk, Warren & Pitts. Rwy Co.*, 87 *id.* 282, 285; *Tinicum Fishing Co.* v. *Carter*, 90 *id.* 85, 88; *Malone* v. *City of Philadelphia*, 12 W. N. C., 396; *Cumberland Valley R. R. Co.* v. *Rhoadarmer*, 107 Pa., 214, 221.

A reference to a few of these cases will illustrate the injustice and hardship which citizens suffered.

In *Monongahela Nav. Co.* v. *Coons*,[1] the construction of a dam caused the flooding of the plaintiff's mill. GIBSON, C. J. said: "Now, it cannot be said that the plaintiff's mill was taken or applied, in any legitimate sense, by the State, or by the company invested with its power; nor can it be said that he was deprived of it. * * * We have no difficulty in saying that the State is not bound beyond her will to pay for property which she has not taken to herself for the public use. If, then, the State would not be bound to pay for the damage done to the plaintiff's mill, had she been the immediate cause of it, how is the defendant bound? The company acted by her authority, as well as for the public benefit; and consequently with no greater responsibility than is imposed by the Constitution, which, it must be admitted, has narrowed the protection that the delegation of her power would otherwise have afforded." Accordingly a verdict for plaintiff was set aside. But, subsequently, the plaintiff recovered, the Legislature having by a supplementary charter, accepted by the company, made it liable for consequential damages.

In *Henry* v. *Pittsburgh and Allegheny Bridge Company*[2] the plaintiffs sought to recover damages resulting from the raising of a street twelve feet (above the level of the doors of plaintiff's houses), to accommodate the street to the use of the bridge erected by defendants over the Allegheny River; but a recovery was denied on the authority of *Monongahela Navigation Co.* v. *Coons*, "in which it was held that neither the State nor a person, artificial or natural, acting by its authority or command, under a law which the Legislature is competent to make, is answerable for consequential damages occasioned by the construction of a highway, farther than happens to be specially provided." * * * "The bridge was thrown across a navigable stream, from the terminus of one highway to that of another, without encroaching on the plaintiffs' soil, or invading their dominion. Not a shovelful of earth was taken from it, or thrown upon it. There stands

[1] 6 W. & S., 101, 113, 114; 6 Pa., 379.

[2] 8 W. & S., 85, 86.

their property, within its proper limits, as it stood before; and the substance of the thing complained of, would, if done without authority, be a nuisance and the substance of an action on the case."

O'Connor v. *Pittsburgh*,[1] was a case of greater hardship. The city cut down the grade of a certain street greatly to the damage of a church fronting thereon, and it was held damages were not recoverable. GIBSON, C. J., said: "We have had this cause re-argued in order to discover, if possible, some way to relieve the plaintiff consistently with law; but I grieve to say we have discovered none. * * * The constitutional provision for the case of private property *taken* for public use, extends not to the case of property *injured* or *destroyed;* but it follows not that the omission may not be supplied by ordinary legislation. No property was taken in this instance; but the cutting down of the street consequent on the reduction of its grade, left the building useless, and the ground on which it stood worth no more than the expense of sinking the surface of it to the common level. The loss to the congregation is a total one, while the gain to holders of property in the neighborhood is immense. The Legislature that incorporated the city never dreamt that it was laying the foundation of such injustice; but, as the charter stands, it is unavoidable."

In the case of the *Philadelphia and Trenton R. R. Company*,[2] and those of *Cleveland and Pittsburgh R. R. Co.* v. *Speer*,[3] and *Struthers* v. *D., W. & P. Rwy. Co.*,[4] abutting property owners were denied redress for injuries sustained, consequential upon the operation of a railroad in the highway.

To remedy these serious evils Article XVI, Section 8, of the present Constitution was devised, providing that compensation be made for property taken, *injured* or destroyed, by corporations in the construction of their works, etc.

The first case which arose thereunder was *City of Reading* v. *Althouse*,[5] a proceeding for the recovery of compensation

[1] 18 Pa., 187, 189, 190.
[2] 6 Wharton, 45.
[3] 56 Pa., 325.
[4] 87 Pa., 282.
[5] 93 Pa., 400, 404, 406.

for the diversion of a certain stream, from which, through a ditch, plaintiff obtained water for purposes of irrigation; and it was decided that recovery could be had under an Act of Assembly whose terms protected the plaintiff, and also by virtue of Article XVI, Section 8, of the Constitution; GORDON, J., saying: "That section provides for the making of compensation, not only for the *taking* of private property for public use, as was the case theretofore, but also for its *injury* or *destruction*. That the use which the plaintiff made of the waters of the great or Antietam Creek, through the race or ditch in controversy, was property, though of an incorporeal kind, is not open to debate; and that it was injured by the operation of the City of Reading, is a fact established by the proper tribunal. There is, therefore, no good reason apparent to us, why the case should not be covered by the above recited eighth section of the Constitution."

The next case before the Supreme Court was *Borough of New Brighton* v. *United Presbyterian Church*,[1] in which it was held that damages resulting from the change of grade of a street were recoverable by an abutting property owner; and it was ruled "that a change from the natural grade is a change of grade just as clearly as if changed from a grade previously made by the authorities." [2]

Pusey v. *City of Allegheny*[3] followed, deciding that a municipality in opening a street is bound to compensate not only those whose property may be actually taken, but also those whose property is injured or destroyed in consequence of the opening of the street. GORDON, J., said: "Corporations in whom the Legislature has vested the right of eminent domain, are, by this section (Section 8, of Article XVI, of the Constitution) made liable for damages resulting to private property, for the construction, use or alteration of their works, ways or other improvements; in other words to such damages as are ordinarily called *consequential*. This being now the

[1] 96 Pa., 331.

[2] *Hendrick's Appeal*, 103 Pa., 358, 361; *Borough of New Brighton* v. *Piersol*, 107 id. 280; *Landes* v. *Bor. of Norristown*, 21 W. N. C., 212.

[3] 98 Pa., 522, 526.

supreme law of the land, it must govern the case under consideration."

Quite recently the Supreme Court of the United States finally settled a case of vast importance, brought for the recovery of damages done to the property of a citizen of Pennsylvania, by reason of the construction of an elevated railroad along a public highway, in front of his premises, no part of the latter being taken. The matter was first brought into Court in 1879, by the filing of a bill in equity for an injunction to restrain the construction of the road. An injunction was refused by Common Pleas No. 2, of Philadelphia, in a learned opinion by HARE, P. J., MITCHELL, J., filing an opinion concurring in the decree; and, on appeal to the Supreme Court, the decree was affirmed, *per curiam*.[1] On June 6, 1881, the plaintiff brought an action of trespass on the case for the recovery of the damages he sustained, arising from the "construction of an abutment and pier in the Schuylkill River opposite Filbert Street; and from the noise, burning cinders, smoke, dust and dirt, incident to the operation and use of the railroad; by deprivation of plaintiff's use of Filbert Street as a highway, and of four hundred feet of building front on said street; and by deprivation of free access to the wharves on the Schuylkill front of his property." A verdict of $20,000 was rendered in plaintiff's favor, and on writ of error by the defendant, its chief contention was that it could not be bound by Article XVI, Section 8, of the Constitution because by the law, as it was previous to the adoption of this Constitutional provision, it was not liable for such injuries; and such liability could not be imposed upon it, even for its own subsequent act, without a violation of its rights under the law as it was. But this contention was not sustained, and it was held that under the pre-existing law the defendant's rights were in no sense the result of a legislative grant of power to inflict the injury without liability, and the provision of the Constitution referred to took away none of the chartered rights of the defendant. The defendant, there-

[1] *Duncan* v. *Penna. R. R. Co.*, 7 W. N. C., 551; *Duncan's Appeal*, 94 Pa., 435.

fore, was bound by the Constitution of 1874,[1] and the decision was affirmed by the Supreme Court of the United States on November 11, 1889,[2] and the verdict for the plaintiff sustained.

A similar case was that of *Philadelphia and Reading Railroad Co.* v. *Patent*,[3] where the plaintiff recovered damages resulting from the shifting and relocation of defendant's track on the street in front of his property, depriving him of the use of the highway.

These two cases therefore establish that corporations chartered before the adoption of the Constitution of 1874, are liable for "consequential" injuries unless exempted by a charter not subject to constitutional or legislative amendment. In both cases it must be observed that none of the plaintiff's property was taken.

In *Penna. R. R. Co.* v. *Lippincott* and others,[4] and *Penna. R. R. Co.* v. *Marchant*,[5] the plaintiffs brought suits to recover for the depreciation of their properties, situated along the North side of Filbert Street, in consequence of the "noise, burning cinders, smoke, dirt, dust and jarring, incident to the operation and use" of the defendant's elevated railroad, which was constructed on the South side of the street, upon ground owned by the company in fee, the whole width of the street (fifty-one feet) intervening. Under instructions, verdicts were rendered for the plaintiff in each case. The contention of the company, on writs of error, was based on the following propositions:

(1). The eighth section of Article XVI of the Constitution requires compensation to be made to property owners for only such injuries as would be actionable at common law if done by a person not invested with the State's right of eminent domain.

[1] *Penna. R. R. Co.* v. *Duncan*, 111 Pa., 352. See the explanation of the case by GREEN, J., in *Gloninger* v. *Pittsburgh and Connelsville R. R. Co.*, 27 W. N. C. 497, 503; 139 Pa. 13.

[2] 129 Pa., 181; 132 U. S., 75.

[3] 17 W. N. C., 198.

[4] 116 Pa., 472.

[5] 119 Pa., 541. See, also, *Ryan* v. *Penna. R. R. Co.*, 132 Pa. 304; *Auman* v. *Phila. & Read. R. R. Co.*, 133 id. 93; *Dooner* v. *Penna. R. R. Co.*, 142 id. 36; *Robb* v. *Carnegie Bros. & Co., Limited*, 28 W. N. C., 339, 345.

(2). The injuries to the plaintiffs, arising from the construction of the defendant's road on the opposite side of the street on its own property, are not such injuries as would be actionable at common law if done by a person or a corporation vested with a franchise to operate a steam railroad, and not vested with the State's right of eminent domain. The defendant is, therefore, not liable for such injuries.

(3). The Constitution provides only for compensation arising from the construction of the railroad. There can be no compensation for injury to person or property (unaccompanied with negligence), arising from the operation or use of the railroad, as distinguished from its construction.

In reversing the Lippincott case and those argued with it, GORDON, J., said:[1] "This structure having been erected on the defendant's own land, and no property or right of the plaintiffs having been seized, appropriated, or interfered with, we cannot understand how a rule which applies only to a taking, and never did apply to anything else, can be adapted to a case where there has been no such taking. It is not pretended that the erection itself did the plaintiffs any harm, but its use only—that is, the running of locomotives on it. * * 'It is a principle well settled by many adjudicated cases that an action does not lie for a reasonable use of one's right, though it be to the injury of another. For the lawful use of one's own property a party is not answerable in damages, unless on proof of negligence.' How then, we ask, can a lawful erection by the Pennsylvania Railroad Company on its own ground be the subject of damages to the adjoining landowners? And why may it not, as put by the defendant's first point, operate and use in a lawful manner its Filbert Street branch without subjecting itself to an action for damage? It seems to be very clear that a private person could do with impunity on his own property just what the railroad company has done. He might build a house, and thus shut out his neighbor's view, light and air; he might build an embankment, or run a road on or along his own line, and be liable for nothing as long as he used his house, embankment or road in a lawful manner, although in either

[1] 116 Pa., 481, *et seq.*

case an injury may have been done to the adjacent property. * * In the case in hand the plaintiffs sustained no injury from the construction of the viaduct; none of their property was taken, neither was any of their rights infringed, so that neither by the Constitution nor by the cases quoted,[1] is there a warrant for the plaintiffs' contention. We agree that over and beyond the damages which arise from a taking of property, whether in the shape of land or a right, the Constitution does impose on corporations a direct responsibility for every injury for which a natural person would be liable at common law; so we have held in the case of *Edmundson* v. *The Railroad Company*, *111 Pa.*, *316*, and to this doctrine we adhere, for such we think is the spirit of that instrument, but beyond this we cannot go. Nor is there any reason why we should depart from a rule so reasonable and subject artificial persons to a burden which cannot be imposed upon natural persons. * * * If this Pennsylvania Company has been guilty of a nuisance; if in the use of its road it makes more smoke or dust than is lawfully allowable in the working of its machinery, and the plaintiffs are thereby injured, they have their remedy, but not for anything short of this. Any other rule would lead to this remarkable result, that the plaintiffs would be entitled to damages without having suffered any injury; that is, for anticipated damages, and for which a natural person could not be held liable. Moreover the corporation would thus be made responsible for the manner in which it proposed to exercise its right, though such manner might not only be lawful, but the best possible, and the least injurious to the property of others." TRUNKEY and STERRETT, JJ., dissented.

In the subsequent case of *Penna. R. R. Co.* v. *Marchant*,[2] the decision in the Lippincott case was followed, PAXSON, J., filing the opinion of the majority of the Supreme Court, in which it was said: "It is very plain to our view that the constitutional provision was only intended to apply to such injuries as are

[1] *Pusey* v. *City of Allegheny*, 98 Pa., 522; *Pittsburgh Junction R. R. Co.'s Appeal*, 18 W. N. C., 527; *Penna. R. R Co.'s Appeal*, id. 418; *Penna. R. R. Co.* v. *Duncan*, 111 Pa., 352.

[2] 559, *seq.*

capable of being ascertained at the time the works are being constructed or enlarged, for the reason among others, that it requires payment to be made therefor, or security to be given in advance. This is only possible where the injury is the result of the construction or enlargement. For how can injuries which flow only from the future operation of the road, which may never happen, be ascertained in advance, and compensation made therefor.

"It remains to say that if the construction of the Constitution contended for be correct, then we have a liability imposed upon corporations in the operation of their works which is not now, and never has been, imposed upon individuals. No principle of law is better settled than that a man has the right to the lawful use and enjoyment of his own property, and that if in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is *damnum absque injuria*. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own. In the late case of the *Pennsylvania Coal Company* v. *Sanderson*, 113 Pa. 126, it was said by our brother CLARK: 'Every man has the right to the natural use and enjoyment of his own property, and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's land may cause damage to another without any legal wrong.'[1] * * * * It was not contended that the injuries of which the plaintiff complains, are in any degree the result of the negligent or unskillful operation of the defendant's road. * * * This brings us to the question whether in case a natural person were the owner of this road, and were operating it in the manner that the defendant company are now doing, he would be responsible to the plaintiff

[1] See also *Collins* v. *Chartiers Valley Gas Co.*, 131 Pa., 143; *Del. & Hud. Canal Co.* v. *Goldstein*, 125 *id.* 246; *Fulmer* v. *Williams*, 122 *id.* 191; *Price* v. *Grantz*, 118 *id.* 402; *Penna. R. R. Co.* v. *Miller*, 112 Pa., 34; *Lybe's Appeal*, 106 *id.* 626; *Collins* v. *Chartiers Valley Gas Co.*, 27 W. N. C. 217; *Commonwealth* v. *Miller id.* 257; *Robb* v. *Carnegie Bros. & Co. Limited*, 28 *id* 339, 345, where *Penna. R. R. Co.* v. *Lippincott*, 116 *Pa.* 472, was examined and distinguished; *Keiser* v. *Mahony City Gas Co.*, 28 W. N. C. 369; *Clark* v. *Penna. R. R. Co.*, 29 *id.* 49.

in damages. We answer this question in the negative. He would not be responsible, for the reason above given, viz.: that he would have a right to the reasonable use and enjoyment of his property, and if, in such use, without negligence or malice, a loss unavoidably falls upon his neighbor, he is not liable in damages therefor. * * * The necessities of a railroad company and the character of its business compel it to seek the heart of a great city. This is as much for the convenience of the public as for its own. Hence the transportation of passengers and freight as near to the centre of a town as possible is in the direct line of its duty, whether that duty be performed by a corporation or individual. It is a part of the lawful use and enjoyment of property, and, where it is done without negligence, entails no legal liability therefor."[1]

A "consequential" injury, within the intendment of Article XVI, Section 8, was defined to be "an injury to a man's property, the natural and necessary result of the construction or enlargement of its works by a corporation; an injury of such certain character that the damages therefor can be estimated and paid or secured in advance as provided in the Constitution." And the word "injury" (or "injured") as used in the Constitution means "such a legal wrong as would be the subject of an action for damages at common law. For such injuries, both corporations and individuals now stand upon the same plane of responsibility."

In his vigorous dissenting opinion STERRETT, J., says:[2] "Such a narrow construction of the section under consideration was never dreamed of by those who took an active part in moulding it into its present form, as the debates of the Convention will show, nor was it so understood by the people who adopted it; nor is it the construction theretofore clearly recognized and adopted by this Court in several cases, some of which have been specially mentioned. The crowning vice of the construction is in restricting the words '*injured* or *destroyed*' to such injuries as result wholly from construction alone, and holding there can be no recovery for injuries resulting from the use of the road for the very pur-

[1] *Robb* v. *Carnegie Bros. & Co.*, 28 W. N. C. 339, 345; per WILLIAMS, J.

[2] 119 Pa., 572, *et seq.*

poses for which its construction was authorized by the Legislature. * * * In the case of actual taking, whereby the company acquires an easement or right of way over the property appropriated, the purpose for which the servitude is thus fastened upon the land, the duration and manner of enjoyment, the injury to remaining land resulting therefrom, are all taken into consideration. Why should not this be done also where there is a direct and manifest injury unaccompanied by actual taking? It was so held in the cases of *Railroad* v. *Duncan* and *Railroad* v. *McCutcheon*, both of which were cases of injury resulting from operation of the respective roads without any taking. It may be asserted without fear of successful contradiction that in principle they are both identical with the present and other Filbert Street cases."

The facts in the case of *Pittsburgh Junction R. R. Co.* v. *McCutcheon*,[1] were these: In the construction of its elevated road the company took complete possession of a street building solid stone walls of heavy masonry across its entire width almost completely cutting off access to the plaintiff's dwelling houses. The Court refused the following point, presented by the defendant: "That the plaintiff can recover damages only for such injuries as would have been actionable at common law, had the defendant proceeded without legislative authority, and that damages arising from noise, smoke and dirt in the passage and re-passage of trains upon the road are not peculiar and special to the plaintiff, but are in the nature of common annoyances, for which a right of action at common law would not lie in favor of an individual, and are therefore, not to be taken into consideration in estimating plaintiff's damages in this case." The question was elaborately argued before the Supreme Court, which, in a short *per curiam* opinion, said: "Under the new constitution, the plaintiff was entitled to compensation for all damages direct or consequential which he suffered or might suffer in consequence of the building and *operation* of the defendant's road." And the judgment for plaintiff was affirmed.

[1] 18 W. N. C., 527.

In *Penna. R. R. Co.'s Appeal*[1] the appellees obtained an injunction restraining appellant from constructing or maintaining a railroad track along a highway on which plaintiff's properties abutted. In affirming the case, TRUNKEY, J., said: "True, they have not taken the plaintiffs' property, and if the plaintiffs have not been specially injured they are not entitled to an injunction. * * But he who has his dwelling fronting on the street, * * * who is subject to the smoke, noise and other incidents of railway trains passing near his door, suffers a special injury. Were the road lawfully constructed, the only question would be, whether the plaintiff's lots were worth less by reason of the construction, and if so, how much."

In *County of Chester* v. *Brower*,[2] the plaintiff recovered consequential damages caused by the erection of the abutments of a county bridge, fourteen feet above the grade of the street in front of his house; there was no taking of any of plaintiff's property.[3] It was also decided that a county was a corporation within the meaning of Article XVI, Section 8, of the Constitution, and therefore liable for consequential damages.

Penna. Schuylkill Valley R. R. Co. v. *Walsh*,[4] was an action of case brought for the recovery of damages arising from the construction and operation of defendant's railroad along a street in front of plaintiff's premises; the allegation was that by reason of the obstruction of the highway, access to plaintiff's buildings was cut off and the same rendered difficult of approach, and the buildings, parsonage, church and school rendered unfit for use as such, and their value totally destroyed. In affirming the judgment entered for plaintiff, PAXSON, C. J., said: "In *Railroad Company* v. *Lippincott* and *Railroad Company* v. *Marchant*, as in this case, there was no

[1] 115 Pa., 514, 529.

[2] 117 Pa., 647.

[3] See, also, on the question of change of grade: *Kershaw* v. *City of Philadelphia*, 27 W. N. C. 341; *Chambers* v. *Borough of South Chester*, 28 id. 249; 140 Pa. 510; *In re Plan*, 166, 28 W. N. C. 406; *Ogden* v. *City of Philadelphia*, id. 413.

[4] 124 Pa., 544, 559.

actual taking of any portion of the plaintiff's property, but there the analogy ceases. In the cases cited there was no injury by reason of the construction of the road; here there was an injury and a serious one, the direct result of the construction. The track was laid close to the curbstone on the side of the street next to the plaintiff's property, by means of which the access thereto if not actually cut off, was rendered dangerous. In this respect the case is upon all fours with *Railroad Company* v. *Duncan*, 111 Pa., 352 and *County of Chester* v. *Brower*, 117, id. 647. It was urged, however * * * that the injury was solely the result of the use and operation of the road. This is plausible but unsound. Where the question is the obstruction of access to a property by the building of a railroad, it is impossible to separate the construction from the operation of the road. Such a doctrine would be a misapplication of the rule laid down in *Railroad Company* v. *Marchant*. It would be an unsavory technicality to hold that a railroad laid down by the curb in front of a man's door, with trains constantly passing and repassing, did not interfere with his access to his house, and was not an injury caused by the construction of the road. No authority for such a proposition can be found in anything this Court has ever said. We are of opinion that in the case in hand there was an injury arising from the erection and construction. This being so it stands upon the same footing as to consequential injuries as if there had been an actual taking of a portion of the plaintiff's property."

Penna. Schuylkill Valley R. R. Co. v. *Ziemer*,[1] was an exactly similar case, and consequential damages arising from the construction and lawful use of the road along the highway in front of plaintiff's premises were likewise recovered.

In *Northern Central Rwy. Co.* v. *Holland*,[2] damages were recovered for depreciation in value of plaintiff's property by reason of the enlargement of and operation of defendant's roadway, re-located so close to the property as to obstruct ingress and egress thereto, fill it with smoke, cinders, offensive smells, depriving it of facilities for light and air, etc.

[1] 124 Pa., 560.

[2] 117 Pa., 613.

In *Snyder* v. *City of Lancaster*,[1] the opening of a street necessitated the taking down of a house adjoining the plaintiff's property, and it was held that inasmuch as the plaintiff's house would thereby have no gable end, the opening of the street was an injury within the intendment of the Constitution, although no part of plaintiff's property was actually taken.

For the lawful vacation of a public highway, no damages are recoverable by him injured in consequence. The public have but a right of way, and upon the vacation of the road, the owners of the soil are reinvested with absolute control over it; each abutting property-owner having title to the middle of the road, if not inconsistent with this grant. This was decided in *Paul* v. *Carver*,[2] where BLACK, J., said: "Surrendering the right of way over a public road to the owners of the soil, is *not* taking private property for public use, and the proprietors of other land incidentally injured by the discontinuance of the road are not entitled to compensation A private road is private property, and an Act of Assembly to close it up without paying for it, would be depriving the owner of his property. But a public road belongs to nobody but the State; and when the Government sees proper to vacate it, the consequential loss, if there be any, must be borne by those who suffer it, just as they would bear what might result from a refusal to make it in the first place." The Constitution of 1874 has not altered the law in this instance. The question arose in *McGee's Appeal*,[3] which was from a decree sustaining a demurrer to a bill in equity for an injunction to restrain the destruction of a bridge forming part of Washington Street, in the city of Pittsburgh, upon which street the complainant's property abutted. As the consequential injury arose from the vacation of a public street by the municipal authorities, to whose lawful acts the plaintiff was subject, and as no private property was taken or applied to public use, but, on the contrary, private property was surrendered to him from whom it had theretofore been taken by the public, relief was denied; though had there been special legislation for an award of

[1] 20 W. N. C., 184.

[2] 24 Pa., 207, 211.

[3] 114 Pa., 470.

damages to the owners of property injured by the vacation, the same would be recoverable.[1]

Nor for the opening of a public highway by the State can compensation be demanded, without an express provision therefor. The original grants from the proprietaries or the commonwealth of Pennsylvania contained an allowance of six per cent. for highways. Provision having thus originally been made for the taking of land for public highways, there exists no constitutional or other obligation for the State to make additional compensation for the opening of public highways.[2] "Roads are laid out under the authority of the commonwealth, and in the exercise of the right of eminent domain. Neither the commonwealth, nor the township or other municipal division through which the road passes, is liable to land-owners for damages sustained by the exercise of the prerogative of the supreme power of the State, until made so by law."[3] Article XVI, Section 8, of the Constitution provides that municipal and other corporations shall make compensation for property taken, injured or destroyed in the construction or enlargement of their works, *highways* or improvements. A township is not such a corporation as comes within the intendment of this section. Counties and boroughs, however, are municipal corporations, and therefore liable both for land taken and property injured by reason of the opening and grading of streets,[4] the construction of a reservoir,[5] and similar public improvements.

[1] *In re Vacation of Centre Street*, 115 Pa., 247; *In re Howard Street*, 28 W. N. C. 159.

[2] *Township of East Union* v. *Comrey*, 100 Pa., 362, 366; *McClenachan* v. *Curwin*, 3 Yeates, 362, 372-3.

[3] *Wagner* v. *Township of Salzburg*, 132 Pa., 636, 647; per WILLIAMS, J.; *Lamoreux* v. *County of Luzerne*, 116 *id.*, 195, 197.

[4] *Wagner* v. *Township of Salzburg*, 132 Pa., 636, 647; *Streets and Alleys in Parkesburg Borough*, 124 *id.*, 511, 525; *Appeal of the County of Delaware* 119 *id.*, 159; *County of Chester* v. *Brower*, 117 *id.*, 647, 655; *Lamoreux* v. *County of Luzerne*, 116 *id.*, 195, 199; *Coutra, Freeze* v. *County of Columbia*, 6 W. N. C., 145; See *Marshall* v. *Township of Lower Towamensing*, 15 *id.*, 235.

[5] *Haupt's Appeal*, 125 Pa., 211, 223; *Lord* v. *Meadville Water Co.*, 26 W. N. C., 110.

Consequential damages arising from the negligent construction of a railroad, are not recoverable.[1] "The inconvenience to the public caused by building a railway over a street, or the convenience resulting from building a bridge over a river, though diverting business from a ferry, is not an injury to private property for which the owner of the ferry may recover damages. A lawful construction of a railway over a street, or of a bridge over a river, though likely to diminish the receipts of a ferry, is not injury to private property in the franchise of the ferry, within the intendment of the Constitution."[2]

In *Knoll* v. *N. Y., Chi. & St. L. R. R. Co.*,[3] the plaintiff, a mortgagee, not in possession, of certain premises was denied damages for the alleged depreciation in value of the mortgaged premises, by reason of the construction of defendant's railroad in the street on which they faced, as the mortgagor in possession had *bona fide* made a settlement with the company and given a release of damages; the mortgagee had made no attempt to collect the mortgage debt, and it was apparent that the property in its present condition was abundant security for the mortgage.

An action on the case is the proper remedy for the recovery of consequential damages, under Article XVI, Section 8, of the Constitution, in the absence of a remedy provided by the Legislature for the assessment of such damages. A jury to assess damages can only be appointed where property is actually taken.[4]

[1] *Edmundson* v. *Pittsburgh, McKeesport and Youghiogeny R. R. Co.*, 111 Pa., 316.

[2] *Pittsburgh & Lake Erie R. R. Co.* v. *Jones*, 111 Pa., 204, 213; per TRUNKEY, J.

[3] 121 Pa., 467.

[4] *Meyer* v. *Horst*, 106 Pa., 552; *Penna. R. R. Co.* v. *Duncan*, 111 *id.*, 352; *Phila. & Read. R. R. Co.* v. *Patent*, 17 W. N. C., 198; *Levering* v. *Phila., Gtn. & C. H. R. R. Co.*, 18 *id.*, 50; *Northern Central Rwy. Co.* v. *Holland*, 117 Pa., 613; *County of Chester* v. *Brower*, *id.*, 647; *Appeal of the County of Delaware*, *id.*; *In re Plan 166*, 28 W. N. C. 406; *Kershaw* v. *City of Philadelphia*, 27 *id.* 341.

The concluding words of the constitutional section under consideration are, "which compensation shall be paid or secured before such taking, injury or destruction." In *Penna. R. R. Co.* vs. *Marchant*,[1] it was said that compensation could only be paid or secured in advance for such injuries as resulted from construction or enlargement. "For how can injuries which flow only from the future operation of the road, which may never happen, be ascertained in advance, and compensation made therefor?" But in *O'Brien* vs. *Penna. Sch. Val. R. R. Co.*,[2] it was held that where no security was provided in advance recovery could be had for consequential injuries, likely to occur by the construction of a railroad, by suit commenced immediately after the commencement of the work.

Acts of Assembly vesting in corportions the right to private property, without providing for compensation, are unconstitutional.[3] Until compensation is made or secured, railroad and other corporations or individuals, invested with the right of eminent domain, acquire no title to the land they may take. They are trespassers, and the owner may maintain ejectment.[4] Although a street may have been located on a plan, until it is opened and damages secured, a railroad company cannot take or occupy it in constructing its roadway,

[1] 119 Pa., 541, 559; per PAXSON, J.; see *Minnig* v. *N. Y., Chi. & St. Louis R. R. Co.*, 11 W. N. C., 297.

[2] 119 Pa., 184.

[3] *Fleming's Appeal*, 65 Pa., 444, 449; *Borough of Strasburg* v. *Bachman*, 21 W. N. C., 462; *Lebanon School Dist.* v. *Lebanon Female Seminary*, 22 id., 65; *Danville, Hazleton & Wilkesbarre R. R. Co.* v. *Commonwealth*, 73 Pa., 29, 36.

[4] *Phila. Newton & N. Y. R. R. Co.* v. *Cooper*, 105 Pa. *Oliver* v. *Pitts., Va. and Charleston R. R. Co.*, 131 Pa., 408; *Wheeling, Pitts. & Balto. R. R. Co.* v. *Warrell*, 122 id., 613; *Gilmore* v. *V. & C. R. R. Co.*, 104 id., 275, 280; *Pitts. & L. E. R. R. Co.* v. *Bruce*, 102 id., 23; *Phillips* v. *Dunkirk, Warren & Pitts. R. R. Co.*, 78 Pa., 177; *McClinton* v. *Pitts. Ft. Wayne & Chi. Rwy. Co.*, 66 id., 404; *Levering* v. *Phila. Gtn. & N. R. R. Co.*, 8 W. & S., 459; *Lord* v. *Meadville Water Co.*, 26 W. N. C., 110; *Campbell* v. *Pittsburgh & Western Rwy. Co.*, 137 Pa. 574, 579; *Richards* v. *Buffalo*, etc. *R. R. Co.*, *id.* 524; *Williamsport & North Branch R. R. Co.* v. *Philadelphia & Erie R. R. Co.*, 141 *id.*, 407.

unless compensating the owner of the land.[1] In *Sterling's Appeal*,[2] it was decided that an injunction could issue restraining the laying of a pipe line without making or securing compensation, as it was an injury of such a continuing and permanent nature, that a common law action would afford no adequate remedy.[3]

Likewise, trespass is maintainable for an unlawful entry, *i. e.*, where compensation is not made, or a bond tendered, as required by Act of Assembly. And recovery may be had for damages suffered up to the time of bringing suit, or until a bond is filed and approved by the Court. The subsequent tender of a bond and approval of security, and the institution of proceedings for the condemnation of the land do not divest the right of action which accrued at the commission of the trespass. However, should the land-owner submit his case to a jury of view, it is a waiver of an action of trespass, even though the jury fail to award him damages. "But compensation for the permanent injury, arising from the taking of the land, under the power of eminent domain, is to be assessed in the statutory proceeding; and evidence as to the effect of such appropriation upon the market value of the property, a part of which has been taken, is inadmissible upon the trial of an action for the trespass of entering without previous payment or offer of security."[4] A land-owner is estopped from treating as a trespass the entry of a railroad corporation,

[1] *Beidler's Appeal*, 23 W. N. C., 451; *Quigley* v. *Penna. Sch. Val. R. R. Co.*, 121 Pa., 35; *Pitts. & L. E. R. R. Co.* v. *Bruce*, 102 id., 23; *Jarden* v. *P. W. & B. R. R. Co.*, 3 Whar., 502.

[2] 111 Pa., 35.

[3] See also *Penn Gas Coal Co.* v. *Versailles Fuel Gas Co.*, 131 Pa., 522; *Appeal of Curwensville Borough*, 129 id., 74.

[4] *Keil* v. *Chartiers Val. Gas Co.*, 131 Pa., 466; *Bethlehem South Gas and Water Co.*, v. *Yoder*, 112 id., 136, 142; *Penna R. R. Co.* v. *Eby*, 107 id., 166, 172; *Gilmore* v. *L. V. and P. R. R. Co.*, 104 id., 275, 280; *Dimmick* v. *Brodhead*, 75 id., 464, 466-7; *McClinton* v. *Pitts., Ft. Wayne and Chi. Rwy. Co.*, 66 id., 404; *Borough of Harrisburg* v. *Prangle*, 3 W. & S., 460; *Lord* v. *Meadville Water Co.*, 26 W. N. C., 110; *Williamsport & North Branch R. R. Co.* v. *Phila. & Erie R. R. Co.*, 27 id., 536; 141 Pa. 407; *Graham* v. *Pitts. & Lake Erie R. R. Co.*, 48 Leg. Int. 538. The owner of the land cannot appropriate the property of the trespasser left thereon; *Justice* v. *Nesquehoning Val. R. R. Co.*, 87 Pa., 28.

without payment of damages or tender of security, when he consents to the entry and sees the expenditures of large sums of money upon his land in the construction of an extension of a line of railroad in actual operation. But he is not thereby deprived of his right to compensation. He can proceed to have the damages assessed in the statutory manner, or he may bring ejectment for the land, but upon his recovery of judgment in the latter proceeding, execution will be stayed, upon payment of costs, to allow the corporation to condemn the land, as of the time of its entry, in accordance with the statutory enactment.[1] Pending proceedings for the ascertainment of compensation, the corporation may mortgage its equitable interest, subject to the payment of the judgment for the purchase money.[2]

We have seen that under previous Constitutions it was held that the power of taxation in a municipality was sufficient security for property taken by it.[3] Accordingly in the *Appeal of the County of Delaware*,[4] the same rule was held applicable under the present Constitution, and plaintiff was refused an injunction to secure compensation for injuries likely to be done him by the reconstruction of a bridge.

If damages are neither paid nor secured in advance, suit may be brought for their recovery immediately after the commencement of the work, and recovery had for all damages which may be caused by the location and subsequent construction of the road. The injury is complete as soon as the work is actually undertaken at the point where the injury is done, according to the plans and purposes of the company, as defined by their location, grade and general scheme of construction. The injury is a single one—entire and indivisible—and damages recoverable for both the location and construction of the road. Therefore, but a single action is maintainable, which may be brought as stated, as soon as the work which caused the injury complained of is undertaken. But

[1] *Oliver* v. *Pitts., Va. and Charleston Rwy. Co.*, 131 Pa., 408; *Graham* v. *Pitts. & Lake Erie R. R. Co.*, 48 Leg. Int. 538.

[2] *Borough of Easton's Appeal*, 47 Pa., 255.

[3] See *ante*, p. 467.

[4] 119 Pa., 159; *Bromley* v. *City of Philadelphia*, 47 Leg. Int., 318.

the mere fact that the railroad company had driven stakes along the middle of the proposed route, and has formally adopted the same, and has obtained the assent of the city authorities thereto, vests no right to damages prior to the actual commencement of the construction of the track.[1] And where the owner of property injured died after the commencement of the work, but before its completion, suit was properly brought by his executrix, as the right of action accrued during testator's lifetime.[2] Proceedings must be instituted, it would seem, within six years of the "actual, physical completion of the work."[3] The Act of May 24, 1878 does not authorize the recovery of damages for injuries resulting from the change of grade of a street prior to the adoption of the present Constitution.[4]

A claim for consequential damages is a continuing lien upon the corporate franchises of the company exercising the right of eminent domain, and proceedings already commenced can be continued against the sheriff's vendee.[5]

Compensation is the consideration or price of a privilege purchased. It is usually called damages.[6] It need not consist in money; it may be awarded in particular benefits which the land owner receives; but benefits in which he shares equally with all others are not just compensation.[7]

[1] See *Appeal of N. B. and N. C. R. R. Co.*, 105 Pa., 13; *Phila and Gray's Ferry Pass. Rwy. Co.'s Appeal*, 102 id., 123; *Williamsport & North Branch R. R. Co.* v. *Phila. & Erie R. R. Co.*, 141 id., 407. See, also, *Jones* v. *Erie & Wyoming Valley R. R. Co.*, 29 W. N. C. 167.

[2] *O'Brien* v. *Penna. Sch. Val. R. R. Co.*, 119 Pa., 184; *Penna. Sch. Val. R. R. Co.* v. *Ziemer*, 124 id., 560.

[3] *Brower* v. *City of Philadelphia*, 26 W. N. C., 270, 272; 28 id. 87; 142 Pa. 350; *Landes* v. *Borough of Norristown*, 21 W. N. C., 212: *Hanuum* v. *Borough of West Chester*, 63 Pa., 475, *Volkmor St.*, 124 id., 320; *In re Plan 166*, 28 W. N. C. 406, 409; *Ogden* v. *City of Philadelphia*, id. 413, 415.

[4] *Folkinson* v. *Boro. of Easton*, 116 Pa., 623.

[5] *Lycoming Gas and Water Co.* v. *Moyer*, 99 Pa., 615; *Potter* v. *Potts. Rwy. Co.*, 17 W. N. C., 40.

[6] *Gilmore* v. *Pitts., Va. & Ch. R. R. Co.*, 104 Pa. 275, 281; *Buf., N. Y. & Phila. R. R. Co.* v. *Harvey*, 107 id. 319; *Long* v. *Harrisburg & Potomac R. R. Co.*, 126 id. 143.

[7] *Susanna Root's Case*, 77 Pa. 276; *Opening of Walnut St.*, 28 W. N. C. 51; *In re Howard St.*, id. 159; *In re Market St.*, 42 Leg. Int. 15.

Compensation inheres in the land—it is an *estate*; and although a railroad company had executed a mortgage upon its property and franchises before taking a person's land and the rendition of a judgment for damages, which the company had failed to pay or secure, a sale under that mortgage will not divest the interest of the plaintiff, and he can recover from the vendee the amount of his judgment, viz., the price of the land.[1]

The right to compensation does not rest in contract, express or implied, but solely on an act of appropriation under the power of eminent domain delegated by the State. No consent is necessary to complete the appropriation, which is practically a seizure; and as postponement of payment is in derogation of the citizen's constitutional right, a corporation taking private property is not entitled to a stay of execution under the provisions of the Act of June 16, 1836.[2]

The right to compensation is a personal claim of the land owner at the time of the appropriation of his land or of an injury thereto.[3] The damages do not run with the land, nor pass by a conveyance thereof, although not specially reserved in the deed.[4] In the case of a change of grade of a street, the claim matures when the grade is confirmed; if the land is sold before the grading is actually done, the purchaser can claim no damages.[5] Or if the owner leases land appropriated by a railroad company before a bond is filed or the construction of the road, the right to damages does not pass.[6]

He who claims compensation must first prove his title to the land. The defendant can, of course, show that the premises, or a part thereof, did not belong to the plaintiff.[7] In

[1] *Buf., N. Y. & Phila. R. R. Co.* v. *Harvey*, 107 Pa. 319.

[2] *Harrisburg & Potomac R. R. Co.* v. *Peffer*, 84 Pa. 295.

[3] *Tenbrooke* v. *Jahke*, 77 Pa. 392.

[4] *Losch's Appeal*, 109 Pa. 72.

[5] *Campbell* v. *City of Philadelphia*, 108 Pa. 300; *Borough of New Brighton* v. *Piersol*, 107 id. 280.

[6] *Davis* v. *Titusville & Oil City Rwy. Co.*, 114 Pa. 308; *Warrell* v. *W. R. & B. R. R. Co.*, 130 Pa. 600, 609-10, *Wheeling, R. & B. R. R. Co.*, v. *Warrell*, 122 id. 613.

[7] *Phila. & Read. R. R. Co.* v. *Obert*, 109 Pa. 193; *Penna. Sch. Val. R. R. Co.* vs. *Keller*, 20 W. N. C., 125.

Penna. Schuylkill Valley R. R. Co. v. *Cleary*,[1] an administrator had bought his decedent's land at Sheriff's sale, under a judgment obtained by him in decedent's lifetime. Before the execution of the deed, but after the sale, a railroad company appropriated the land, and it was held that the administrator had title sufficient to maintain an action for damages.

If a railroad company gives a bond to a land-owner to cover damages to be assessed for the taking of his land, or injury to it, the title of the land-owner is gone, and his remedy is on the bond.[2] The land-owner may agree to convey a right of way over his land to a railroad company, and he thereby prevents a recovery of any damages he may sustain and for which he otherwise would be entitled to claim compensation; the release, if for a valid consideration, is also binding upon his lessees and others claiming under him.[3] If the land-owner accepts damages awarded him by the viewers, he is estopped from proceeding by injunction to prevent special injury to his property.[4] It is presumed that the jury included in the award everything that was a legitimate subject of compensation,[5] though they did not itemize the damages, as they could have been requested to do.[6]

The owner of land may lose his right to compensation by a dedication to public use. The dedication may be implied, as where a person divides his land into building lots and opens avenues for the purpose of selling the sites in accordance with this plan; in such case, he makes the streets public highways. But the grantor of land is not deprived of his right to

[1] 125 Pa. 442.

[2] *Fries* v. *So. Pa. R. R. & Min. Co.*, 85 Pa. 73; *Hoffman's Appeal*, 118 id. 512; *Penna. Nat. Gas Co.* v. *Cook*, 123 id. 170; *Wallace* v. *New Castle, etc. R. R. Co.*, 138 id. 168.

[3] *Updegrove* v. *Penna. Sch. Val. R. R. Co.*, 132 Pa. 540; *Oliver* v. *P., V. and C. Rwy. Co.*, 131 id. 408; *Hoffeditz* v. *So. Pa. Rwy. & Min. Co.*, 129 id. 264; *N. & W. Br. Rwy. Co.* v. *Swank*, 105 id. 555; *Crowattain* v. *City of Philadelphia*, 17 W. N. C. 261; *Jones* v. *Penna. R. R. Co.* 28 W. N. C. 375 *Hoffman* v. *Bloomsburg & Sullivan R. R. Co.*, id. 361; *Richards* v. *Buffalo, etc., R. R. Co.*, 137 Pa. 524.

[4] *Campbell's Appeal*, 22 W. N. C. 81.

[5] *Tucker* v. *Erie & N. E. R. R. Co.*, 27 Pa. 281.

[6] *Harvey* v. *Lackawanna & Bloomsburg R. R. Co.*, 47 Pa. 428; *D., L. & W. R. R. Co.* v. *Burson*, 61 id. 369.

compensation for land taken for a public street, by reason of the fact that in the deed the street is mentioned as a boundary, whereas, in fact, the street has only been laid out upon the city plan and remains unopened; when the street is actually opened, the grantor can claim compensation.[1] Dedication to public use depends upon the land-owner's intention. Long continued use by the public is not conclusive evidence of such an intent; it is always open to explanation. If the user has been adverse and exclusive for a period of twenty-one years, the title of the owner is divested, and he is deprived of compensation.[2]

The vendee of land upon which a street has been plotted and the plan for its opening confirmed, cannot, upon its actual opening, recover damages from the vendor upon a covenant implied in the words "grant, bargain and sell," or on a covenant of general warranty. "An entry on land by authority of the State, in the exercise of its right of eminent domain, is not a breach of such a covenant. While the public may enjoy it as an easement, in law, unless otherwise directed by the statute, the fee still remains in the owner. Hence a covenant of warranty 'against the grantor and his heirs, and against all and every other person or persons lawfully claiming or to claim,' was held in *Dobbins* v. *Brown*, 2 Jones, 75, not to be broken by the entry and occupancy of the Commonwealth in the exercise of its right of eminent domain. Such entry is without the consent of the owner. It is an inherent right in the Commonwealth, and its exercise cannot be prevented by the owner. His remedy is compensation provided by the State. An action on the covenant will not lie against the vendor."[3] An entry on land, under the right of eminent domain, incurs no breach of a covenant for quiet enjoyment; it is not an eviction. "The tenants are such owners as are entitled to compensation from the State or her grantee, and must

[1] *In re Opening of Brooklyn Street*, 118 Pa. 640; *In re Opening of Wayne Avenue*, 124 id., 135.

[2] *Weiss* v. *Borough of South Bethlehem*, 26 W. N. C., 433; 136 Pa. 294; *Griffith's Appeal*, 109 Pa., 150; *Commonwealth* v. *P. & R. R. R. Co.*, 135 *id.* 256.

[3] *Ake* v. *Mason*, 101 Pa., 17, 20; per MERCUR, J.

look to that quarter for redress for any injury they may have suffered."[1]

Where the whole of a tract of land is taken by virtue of the exercise of the right of eminent domain, fair compensation is its market value; where but a portion is taken, and applied to a public use, the remainder may be benefited, even to an extent beyond the value of the land taken. A familiar instance is the case of opening streets through a man's property, where the powers of eminent domain and taxation move hand in hand. Eminent domain takes what is wanted, and by virtue of the power of taxation the individual is assessed benefits accruing to his remaining property by reason of the opening of the highway.[2] This leads us to consider—

THE MEASURE OF DAMAGES.

For the taking of land by virtue of the right of eminent domain we consider.

First, the measure of damages where the whole tract is taken; and,

Secondly, where only a part is appropriated.

(*1.*) *Where the whole is taken.*

The owner is entitled to the market value of his property, or what it would bring at a public or private sale, fairly conducted. How is the market value to be estimated? In *Pittsburgh, Virginia and Charleston Railway Company* v. *Vance*,[3] CLARK, J., says: "The market value of land is not necessarily, as would sometimes seem to be supposed, the price which it would command in a forced sale by public auction; it is estimated upon a fair consideration of the location of the land, the extent and condition of its improve-

[1] *Dyer* v. *Wightman*, 66 Pa., 425, 427; per SHARSWOOD, J.; *Schuylkill & Dauphin Imp. & R. R. Co.* v. *Schmoele*, 57 id., 271.

[2] *Pennock* v. *Hoover*, 5 Rawle, 291; *McMasters* v. *Commonwealth*, 3 Watts, 292; *City of Philadelphia* v. *Watts*, 35 Pa., 427; *Commonwealth* v. *Watts*, 44 id., 113; *Hammet* v. *Philadelphia*, 64 id., 156

[3] 115 Pa., 325, 331.

ments, its quantity and productive qualities, and the uses to which it may reasonably be applied, taken with the general selling price of lands in the neighborhood at the time. The price which, upon full consideration of the matters stated, the judgment of well-informed and reasonable men will approve, may be regarded as the market value. The general selling price of lands in the neighborhood cannot be shown by evidence of particular sales of alleged similar properties; it is a price fixed in the mind of the witness from a knowledge of what lands are generally held at for sale, and at which they are sometimes actually sold, *bona fide*, in the neighborhood."[1]

(*2*). *Where a part of the tract is taken.*

The true measure of damages is the difference between the market value of the property unaffected by the obstruction, and its market value afterward. The rule was formulated by GIBSON, J., in *Schuylkill Navigation Company* v. *Thoburn*,[2] where he said: "The jury are to consider the matter just as if they were called on to value the injury at the moment when compensation could first be demanded; they are to value the injury to the property, without reference to the person of the owner, or the actual state of his business; and in doing that, the only safe rule is to inquire what would the property, unaffected by the obstruction, have sold for, at the time the injury was committed? What would it have sold for, as affected by the injury? The difference is the true measure of compensation." In the adjustment of this difference, a fair and just comparison must be made of the advantages and disadvantages necessarily resulting from the construction and operation of the road; and only the advantages which are special, and disadvantages as are actual to the particular property, are to be considered. Among the advantages resulting from the building of the road may be considered the general appreciation of properties in the neighborhood; but unless the particular property

[1] *Pitts. & Western R. R. Co.* v. *Patterson*, 107 Pa., 461; *Curtin* v. *Nittany Valley R. R. Co.*, 26 W. N. C., 161, 166; 135 Pa. 20; *Whitaker* v. *Borough of Phœnixville*, 141 *id.* 327.

[2] 7 S. & R., 411, 422-3.

through which the road runs has advanced in market value beyond that of other properties in the neighborhood, this element of advantage must not be taken into account, as each individual is entitled to share in the general increase of values, as a public benefit. The disadvantages must be actual ones, and not speculative; they must substantially affect the present market value of the land.[1] "The advantages and disadvantages are to be estimated upon the farm or tract as a whole, and not upon each separate field as though it was a separate property. An advantage accruing to one farm or tract by reason of the construction of the railroad near or through it cannot be set off against an injury sustained by another piece of property belonging to the same owner. Nor can the owner of a farm or tract, part of which is benefited and another part of which is injured, divide his property arbitrarily so as to exclude from the consideration of the jury the advantages he secures in one place, while recovering for the disadvantages suffered in another."[2]

What are the qualifications one must possess to testify as to market value? The question is not one of science or skill, upon which only an expert can give an opinion. Persons living in the neighborhood are presumed to have sufficient knowledge of the market value of the property.[2] In *Pittsburgh, Virginia & Charleston Railway Co.* v. *Vance*, CLARK,[4] J., said: "The estimate which a witness may make, it is true,

[1] *Pittsburgh, Bradford & Buffalo Rwy. Co.* v. *McCloskey*, 110 Pa., 436, 442, 443; *Watson* v. *Pittsburgh & Connellsville R. R. Co.* 37 id., 469; *East Penna. R. R. Co.* v. *Hottenstine*, 47 id., 28; *Harvey* v. *Lackawanna & Bloomsburg R. R. Co.*, id., 428; *Hornstein* v. *Atlantic & Great Western R. R. Co.*, 51 id., 87; *Shenango & Allegheny R. R. Co.* v. *Braham*, 79 id., 447; *Long* v. *Harrisburg & Potomac R. R. Co.*, 126 id., 143; *Penna. Canal Company* v. *Hill*, 6 W. N. C., 182.

[2] *Balto. & Phila. R. R. Co.* v. *Springer*, 21 W. N. C., 143, 144; per WILLIAMS, J.; *Harrisburg & Potomac R. R. Co.* v. *Moore*, 4 id., 532; *Balto. & Phila. R. R. Co.* v. *Sloan*, 131 Pa., 568; *Gorgas* v. *P., H. & P. R. R. Co.*, 28 W. N. C, 436; *Harris* v. *Sch. River E. S. R. R. Co.*, 141 Pa. 242; *Chambers* v. *Borough of South Chester*, 140 id., 510; *Geissinger* v. *Hellertown Boro.*, 133 id., 522; *Graham* v. *P. & L. E. R. R. Co.*, 48 Leg. Int., 538; *Fisher* v. *Baden Gas Co.*, 138 Pa. 301.

[3] *Penna, & N. Y. R. R. & Canal Co.* v. *Bunnell*, 81 Pa., 414, 426.

[4] 115 Pa., 325, 332.

is in some sense an opinion, but it is an opinion formed from actual personal knowledge of facts affecting the subject matter of inquiry, and, as a conclusion of fact, is admissible in evidence, from necessity, as the best evidence of which such a question is ordinarily susceptible. In order, therefore, that a witness may be competent to testify intelligently as to the market value of land, he should have some special opportunity for observation; he should, in a general way, and to a reasonable extent, have in his mind the data from which a proper estimate of value ought to be made; if interrogated, he should be able to disclose sufficient actual knowledge of the subject to indicate that he is in condition to know what he proposes to state, and to enable the jury to judge of the probable proximate accuracy of his conclusions. He may hesitate in making an estimate of the value; he may say that he does not know certainly, but after due deliberation may be able to express an opinion, or come to a conclusion, the accuracy of which, under all the evidence, is, of course, wholly for the jury." "Though the knowledge of a witness of the value of lands in the neighborhood may have rested solely upon a few purchases made by the railroad company, and from no other sales or purchases in the real estate market, he has some knowledge upon which to base an opinion, and the value of that opinion is for the jury."[1] But his estimate must cover the whole property, and not only that part with which he was acquainted,[2] even though he should state that the part omitted from his valuation was not affected.[3] Viewers are competent to testify, on an appeal from their award, if restricted to facts

[1] *Pittsburg & Lake Erie R. R. Co.* v. *Robinson*, 95 Pa., 426, 432; *Curtin* v. *Nittany Valley R. R. Co.*, 26 W. N. C., 161; *Kellogg* v. *Krauser*, 14 S. & R., 137, 142; *Brown* v. *Corey & Peterson*, 43 Pa., 495, 506; *Penna. R. R. Co.*, v. *Henderson*, 51 id., 315, 321. *White Deer Creek Imp. Co.* v. *Sassaman*, 67 Pa., 415; *Pitts., Va. & Charleston R. R. Co.* v. *Rose*, 74 id., 362, 368; *Hinkle's Estate*, 20 W. N. C., 351; *Pitts. S. R. R. Co.* v. *Reed*, 44 Leg. Int., 92. *Myers* v. *Sch. Riv. East Side R. R. Co.*, 45 id., 236, 5 Pa. C. C. Rep., 634; *Sch. Riv. East Side R. R. Co.*, v. *Rees*, 26 W. N. C., 500; 135 Pa. 629; *Gorgas* v. *P., H. & P. R. R. Co.*, 28 W. N. C., 436; *Gallagher* v. *Kemmerer*, 29 id., 87; *Smith* v. *Penna. S. V. R. R. Co.*, 141 Pa. 68; See *Penna & N. Y. Canal & R. R. Co.* v. *Madell*, 1 W. N. C., 286.

[2] *Pitts. Va., & Charleston Railway Co.* v. *Vance*, 115 Pa., 325.

[3] *Schuylkill River East Side R. R. Co.* v. *Stocker*, 128 Pa., 233.

within their personal knowledge.[1] So may the jury be permitted to view the premises; their "own observation is just as good as that of any of the witnesses; and whilst they are not to disregard the testimony produced on the trial, they are, nevertheless, not required to repudiate the evidence of their own senses."[2]

The elements of damage are numerous and vary with each case. It may be said generally that "whatever injuriously affects property, as the direct and necessary result of the location of the road upon it, may be considered in the assessment of damages;" any facts tending to enlighten the jury and enable them to correctly judge of the value of the property taken, are admissible in evidence.[3] But "merely speculative damages cannot be allowed. The inconvenience, arising from a division of property or from increased difficulty of access, the burden of increased fencing, the ordinary danger from accidental fires to the fences, fields or farm buildings, not resulting from negligence, and generally all such matters as, owing to the particular location of the road, may affect the convenient use and future enjoyment of the property are proper matters for consideration; but they are to be considered in comparison with the advantages, only as they affect the market-value of the land."[4]

Thus it is error to instruct the jury that they cannot consider, in determining damages, any possible loss that might

[1] *Harrisburg & Potomac R. R. Co.* v. *Slayman*, 2 W. N. C., 103; *Derlan* v. *East Brandywine & Waynesburg R. R. Co.*, 43 Pa., 520, 526.

[2] *Traut* v. *N. Y., Chicago and St. Louis R. Rwy; Co.*, 22 W. N. C., 540; *Hartman* v. *Penna, Schuylkill Valley R. R. Co.*, id., 84; *Flower* v. *Balto. & Phila. R. R. Co.*, 132 Pa., 524; *Hoffman* v. *Bloomsburg & Sullivan R. R. Co*, 28 W. N. C., 361; *Gorgas* v. *P., H. & P. R. R. Co.*, id., 336.

[3] *Schuylkill River East Side R. R. Co.* v. *Kersey*, 25 W. N. C. 455; 133 Pa. 234; *Penna. Sch. Valley R. R. Co.* v. *Keller*, 20 id., 125; *McTerren* v. *Mont Alto R. R. Co.* 2 id. 40; *East Brandywine & Waynesburg R. R. Co.* v. *Rauck*, I id. 608 (where it was held that defendant could offer evidence of plaintiff's declaration as to the value of his land and the price obtained for certain portions previously sold by him); *Danville H. & W. R. R. Co.* v. *McKelvey*, id. 338; *Penna. & N. Y. Canal & R. R. Co.* v. *Madell*, id. 287; *Danville, Hazleton & Wilkesbarre R. R. Co.* v. *Gearhart*, id. 237; 32 P. F. Smith, 260.

[4] *Pittsburgh, Bradford & Buffalo Railway Co.* v. *McCloskey*, 110 Pa. 436, 442, 443; per CLARK, J.

occur by fire or other cause in the management of a railroad. The risk of fire is clearly an element of depreciation; but its effect on the market value is but a consideration in estimating the damages, and not an exclusive item.[1] Likewise, the cost of fencing cannot be recovered as a distinct item of damages, though the jury may consider how much the burden of fencing will detract from the value of the land.[2] So evidence of a loss of the custom of a mill, in consequence of a location of a railroad in front of it, is admissible, not as a distinct or legitimate item of damages, but as affecting the market-value.[3] But the jury cannot consider any supposed loss of profits,[4] though the fact that the premises were more difficult to rent is an element which may be considered in determining the difference in value.[5]

In the case last cited it was held that where, by reason of the widening of a street an owner of property in making alterations thereto is obliged to recede from the old building-line and build in a recess between two unaltered adjacent houses, the inconvenience to occupants of the premises so reconstructed, and the consequent difficulty of procuring tenants, are proper elements of damage; and the possibility that the adjoining buildings would, at some future time, be set back, was also to be considered as an element in determining the value of the property before and after the widening of the street.

[1] *Setzler* v. *Penna. Sch. Valley R. R. Co.*, 112 Pa. 56; *Gilmore* v. *P., V. & C. R. R. Co.*, 104 *id* 275; *Wilmington & Reading R. R. Co.* v. *Stauffer*, 60 Pa. 374; *Hoffman* v. *Bloomsburg & Sullivan R. R. Co.* 28 W. N. C., 361.

[2] *Curtin* v. *Nittany Val. R. R. Co.*, 26 W. N. C. 161; 135 Pa. 20; *Pittsburgh, Bradford & Buffalo Rwy. Co.* v. *McCloskey*, 110 Pa. 436; *Penna. & N. Y. Canal & R. R. Co.* v. *Bunnell.* 81 id. 414; *D., L. & W. R. R. Co.* v. *Burson*, 61 id. 369; *Watson* v. *Pittsburgh & Connellsville R. R. Co.*, 37 id. 469; *Plank-Road Co.* v. *Ramage*, 20 id. 95; *Montour R. R. Co.* v. *Scott*, 11 W. N. C. 51.

[3] *Pittsburgh, Virginia & Charleston Rwy. Co.* v. *Vance*, 115 Pa. 325; *Western Penna. R. R. Co.* v. *Hill*, 56 id. 460.

[4] *Pitts. & West. R. R. Co.* v. *Patterson*, 107 Pa. 461; *Penna. R. R. Co.* v. *Eby*, id. 166; *In re Widening of Chestnut Street*, 20 W. N. C. 77.

[5] *Pittsburgh, Va. & Charleston R. R. Co.* v. *Rose*, 74 Pa. 362; *City of Philadelphia* v. *Linnard*, 67 id. 242; *Keiser* v. *Mahanoy City Gas Co.*, 28 W. N. C. 369.

In the case of opening a street, the possibility that other streets may at some time be opened through or near the plaintiff's property, which, when opened, will render it more valuable for building lots, is not to be considered as an advantage. But where the opening of a particular street enables the owner of property through which it passes to lay out other streets on his own land, thereby increasing his available frontage and the market value of his property as a whole, this circumstance may be considered by the jury in assessing him benefits.[1] In the *Newville Road Case*[2] it was said that in estimating damages for the opening of a public road, the fact that it would revert, upon its vacation (a possible, though uncertain event) to its former proprietors, is to be considered. But this is so only where the State has imposed a servitude on the land, by devoting it to public use as a highway, and not where the commonwealth acquires a fee simple: for, in the latter event, the land would not revert on a cessation of its use as a public highway.[3]

The value of unopened mines or quarries beneath the surface cannot be considered, though the value of the land as mining-land is recoverable.[4] The construction of a railroad through mining-lands may increase the value of the land to

[1] *City of Allegheny* v. *Black's Heirs*, 99 Pa. 152.

[2] 8 *Watts*, 172, 177.

[3] *Haldeman* v. *Penna. Cent. R. R.*, 50 Pa. 425; *Craig* v. *Mayor of Allegheny*, 53 id. 477; *Penna & N. Y. Canal & R. R. Co.* v. *Billings*, 94 id., 40, 44; *Penna. Canal Co.* v. *Harris*, 101 id. 80, 92. Where a corporation acquires but an easement, on a cessation of the use, the land reverts to him from whom it was originally taken: *Jessup* v. *Loucks*, 55 Pa. 359, 361; and cannot again be taken by virtue of the right of eminent domain without compensation any more than any other property; *Pitts. & Lake Erie R. R. Co.* v. *Bruce*, 102 Pa. 23; *Phillips* v. *D. W. & P. R. R. Co.*, 78 id. 177. In *Mifflin* v. *R. R. Co.*, 16 Pa. 182, a turnpike company took an individual's land, making him full compensation. An Act of Assembly subsequently authorized the sale of the road to a railroad company, which was made liable for consequential injuries. It was held that the settlement with the turnpike company did not estop the plaintiff from recovering damages consequent upon the construction of the railroad.

[4] *Searle* v. *Lackawanna & Bloomsburg R. R. Co.*, 33 Pa. 57; *Reading & Pottsville R. R. Co.* v. *Balthaser*, 126 Pa. 1; 119 id. 472. See *Penn Gas Coal Co.* v. *Versailles Fuel Gas Co.*, 131 id. 522, 532. As to effect of release of right of surface support by a pipe line company, see *McGregor* v. *Equitable Gas Co.*, 139 Pa. 230; *Davis* v. *Jefferson Gas Co.*, 29 W. N. C. 165.

an amount exceeding the damages[1] and evidence thereof, and that better means of transportation were afforded mining proprietors generally, is admissible as elements for the consideration of the jury; but evidence of a reduction in rates of transportation, or as to where the product of the mines or quarries was sold, and how it was shipped there, is inadmissible.[2]

In *Penna. Schuylkill Valley R. R. Co.* v. *Cleary*,[3] it was held improper to introduce evidence to show into how many building lots the land taken could be divided, their separate values, and the probability of their sale; as well as evidence of the fact that the owner declined to lease or sell the land. The possible uses of the ground may be considered; evidence of improvements in the neighborhood is admissible, if not too remote; and the fact that city streets are plotted on the land, and might some day be opened, are proper for the jury's consideration.[4] In *Finn* v. *Providence Gas and Water Company*,[5] it was held error to instruct the jury, in an action for the recovery of damages for the taking of lands and springs for the construction of a reservoir, that they could award as damages to the house erected on the land taken what it was fairly worth to remove the same to some convenient place outside the land covered by the reservoir, including the cost of putting it in as good order as before.

In *Schuylkill River East Side R. R. Co.* v. *Kersey*,[6] the plaintiff, as lessee of a coal wharf and yard, was properly allowed to prove that certain appliances necessary to the conduct of his business were rendered useless by the entry of the railroad, and had to be reconstructed at an elevation, thereby increasing the cost of raising and storing the coal, and the breakage and waste in handling it; not as specific items of claim, however, but as affecting market value.

[1] *McTerren* v. *Mont. Alto R. R. Co.*, 2 W. N. C., 40; *Plank Road Co.* v. *Rea.*, 20 Pa. 97; *Susanna Root's Case*, 77 id. 276.

[2] *Reading & Pottsville R. R. Co.* v. *Balthasar*, 126 Pa. 1; 119 id. 472.

[3] 125 Pa., 442.

[4] *Schuylkill River East Side R. R. Co.* v. *Stocker*, 128 Pa., 233.

[5] 99 Pa., 631.

[6] 25 W. N. C., 455; 133 Pa. 234.

In *Schuylkill River East Side R. R. Co.* v. *Rees*,[1] evidence was properly admitted to show added inconveniences in the use of property which the railroad company reconstructed in place of that appropriated by reason of the construction of the road through the premises.

In *Penna. Schuylkill Valley R. R. Co.* v. *Keller*,[2] evidence offered by defendant to show at the time of the appropriation of plaintiff's ice plant the polluted condition of a stream which flowed into a pond from which plaintiff obtained ice, and through which the road was constructed, was improperly rejected.

In *Potts* v. *Penna. Schuylkill Valley R. R. Co.*,[3] the plaintiffs as partners in the marble business, operated a quarry in Montgomery County, used a lot at Spring Mill, about a mile distant, for the storage of marble and loading it on cars for transportation to their salesyard in Philadelphia. By reason of the location of defendant's road on the Spring Mill lot they contended their business was ruined, that the three properties were used as one, and claimed damages for the depreciation in value of the whole plant. But it was held that damages were only recoverable for injuries to the Spring Mill lot, CLARK, J., saying: "The general rule undoubtedly is that disconnected properties are to be treated as distinct properties, and damages for right of way will ordinarily be assessed on this principle. * * * Peculiar and isolated cases may perhaps exist where, although the lands are not in fact contiguous, yet the uses to which they are applied, respectively, are in their nature so intimate and dependent, one upon the other, that an injury to one must necessarily be taken as an injury to the whole taken together * * * But we do not regard this case as coming within the general exception stated. * * In order that two properties, having no physical connection, may be regarded as one, in the assessment of damages for right of way, they must be so inseparably connected in the use

[1] 47 Leg. Int., 416; 26 W. N. C., 500; 135 Pa. 629.

[2] 20 W. N. C., 125.

[3] 119 Pa., 278.

to which they are applied, as that the injury or destruction of one must necessarily and permanently injure the other."

We have seen that by locating its line thereon a railroad company secures a right to enter upon and occupy a citizen's land, though payment of damages or security therefor must precede an actual entry. Until actual entry, however, the owner may occupy and cultivate the land, and for the destruction of crops, planted after the location but before notice or bond given by the company, compensation must be made. A lessee of the land, taking it with notice of the location of the railroad, has the same right to cultivate the land and recover damages done to his growing crops—a liability which the company cannot discharge by payment to his landlord—though he cannot recover for the diminution of the value of his term.[1]

A life estate in land is an independent interest, and the life tenant is entitled, as well as the remainderman, to security and damages for injuries resulting from the exercise of the right of eminent domain by those empowered therewith. The life tenant and remainderman may join in a suit, the former being entitled to receive damages proportionate to the value of his estate, which may be determined by multiplying the net annual value of the premises by the years of the life tenant's expectancy of life, and reduced to a present cash value.[2]

A tenant for years is likewise the owner of an estate in the land, and may recover damages to his interest; or his landlord may unite with him in a proceeding to recover damages for property taken and injured by a corporation acting under its delegated right of eminent domain, but the jury should designate the damages to which each is entitled. The tenant can prove the value of his leasehold over the rent paid therefor, and the jury may consider his special injuries, as the

[1] *Lafferty* v. *Schuylkill River East Side R. R. Co.*, 124 Pa., 297; *Gilmore* v. *P. V. & C. R. R. Co.*, 104 *id.* 275; *Robb* v. *Carnegie Bros. & Co., Limited.* 28 W. N. C. 339.

[2] *Pitts., Va. & Charleston Rwy. Co.* v. *Bentley*, 88 Pa., 178; *Borough of Harrisburg* v. *Cragle*, 3 W. &. S., 460; *Railroad* v. *Boyer*, 13 Pa., 467; *No. Penna. R. R. Co.* v. *Davis & Leeds*, 26 id., 238; *Heise & Mifflin* v. *Penna. R. R. Co.*, 62 id., 67; *McIntire* v *Westmoreland Coal Co.*, 118 id., 108.

time required in moving and the expenses of such removal, and losses directly resulting from defendant's act; but not for future profits, nor for mental suffering because he would rather have remained. The jury may consider the difference in value of the machinery in connection with the business conducted on the property, and its value to be removed and applied to the same or another use.[1]

Where the owners of property sue for damages, and it appears that there is an outstanding lease by them of the property, the jury may award them damages, making allowance for the value of the leasehold interest, for injury to which the tenants alone can recover.[2]

In *Pittsburgh & Lake Erie R. R. Co.* v. *Jones*,[3] the plaintiff was the owner of a ferry and held a leasehold in the landing thereof and the defendant in constructing its road materially interfered with the landing of boats. It was held that defendant was liable for the depreciation of the value of the leasehold, but not of the franchise.

In proceedings instituted to open a turnpike road to the public, the market value of the stock of the turnpike company, and the actual productiveness of the road, are not proper elements of damage.[4] But where a county takes a private bridge, which may be said to have no general market value, damages are based upon the value of the franchise to the bridge company; which depends upon its productiveness at the time of taking. In this instance the general rule is relaxed, and evidence of past profits is admissible in assessing the damages.[5] If property taken by a corporation in the exercise of the right of eminent domain has been deteriorated in value by reason of the exercise of the right by another

[1] *Getz* v. *Philadelphia & Reading R. R. Co.*, 105 Pa. 547; *Penna. R. R. Co.* v. *Eby*, 107 id., 166, 173; *Philadelphia & Reading R. R. Co.* v. *Getz*, 113 id., 214.

[2] *Penna. Schuylkill Valley R. R. Co.* v. *Ziemer*, 124 Pa. 560.

[3] 111 Pa. 204.

[4] *In re Kensington & Oxford Turnpike Co.*, 97 Pa. 260.

[5] *Montgomery County* v. *Schuylkill Bridge Co.*, 110 Pa. 54; *Mifflin Bridge Co.* v. *County of Juniata*, 29 W. N. C. 399.

corporation, the damages must relate to the existing deterioration.[1]

Interest may be taken into consideration by the jury in assessing damages for land taken by virtue of the right of eminent domain, in view of all the circumstances of the case, in fixing a gross sum. "It is never interest as such, nor as a matter of right, but compensation for the delay, of which the rate of interest affords the fair legal measure." "If it is included in the verdict, it is simply as one element of the damages sustained by the plaintiff and liquidated by the verdict."[2] In *Weiss* v. *Borough of South Bethlehem*,[3] GREEN, J., says: "We have so often held that interest may be allowed from the time of the taking of land for public use, by way of damages, and that even a positive direction to allow interest is not error, that we cannot consider it an open question now. In *Railroad* v. *Burson*, 61 Pa., 369, we said: 'Nor was there error in charging the jury to allow interest. If the plaintiff was entitled to compensation by reason of her property being taken at a particular time she was certainly entitled to interest as a compensation for its wrongful detention.' See also *City of Allegheney* v. *Campbell*, 107 Pa., 530."

If a railroad company enters upon property without right, it is liable for punitive damages. But, if the jury are satisfied the entry was made in good faith, the corporation believing it had the right to enter, such damages should not be imposed.[4] A corporation entering land by virtue of its right of eminent domain, is not liable, under the Act of March 29, 1824,

[1] *Lycoming Gas & Water Co.* v. *Moyer*, 99 Pa. 615.

[2] *Richards* v. *Citizens Nat. Gas Co.*, 130 Pa. 37, 40; *Reading & Pittsville R. R. Co.* v. *Balthaser*, 126 id. 1; *Township of Plymouth* v. *Grover*, 125 id. 24, 37; *Penna. Sch. Val. R. R. Co.* v. *Ziemer*, 124 id. 560; *Getz* v. *Phila. & Reading R. R. Co.*, 105 id. 547; *Davidson* v. *Penn. R. R. Co.*, 15 W. N. C. 312.

[3] 26 W. N. C. 433, 436; 136 Pa. 294.

[4] *Keil* v. *Chartiers Valley Gas Co.*, 131 Pa., 466; *Penna. R. R. Co.* v. *Eby*, 107 id. 166; *P. C. N. Y. Rwy. Co.* v. *Scully*, 16 W. N. C. 213.

for double and treble damages for cutting and removing timber.[1]

Such is, in general, the law in Pennsylvania on the subject of EMINENT DOMAIN as is derived from an examination of the cases. The numerous Acts of Assembly (principally relating to railroad, municipal and other corporations, and to roads and highways), in a manner connected with the subject, merely regulate the exercise of the right and establish a method of procedure in certain instances. These legislative enactments are outside the scope of this paper and have only been referred to, incidentally, in connection with some of the cases considered.

ALFRED ROLAND HAIG.

Supreme Court of Pennsylvania.

JOHN G. CURTIN *v.* P. H. SOMERSET.

APPEAL BY DEFENDANT FROM THE COURT OF COMMON PLEAS, NO. 3, OF PHILADELPHIA COUNTY.

Argued January 27, 1891. Decided February 16, 1891.

SYLLABUS.

(1.) In order that a person who has been injured by an accident may hold another responsible therefor upon the ground of negligence, there must be a causal connection between the negligence and the hurt, and such causal connection must be uninterrupted by the interposition between the negligence and the hurt of any independent human agency.

(2.) A contractor for the erection of a hotel building who uses improper material in its construction and in other respects departs from the specifications embodied in his contract, so that the building when completed is structurally weak and unsafe, will not be liable to a guest of the hotel for an injury caused to him by such defective construction, but occuring after the owner has taken possession.

(3.) The contractor would be responsible to his employer for any loss sustained by the latter in consequence of his failure to erect the building in conformity with the requirements of the contract; but, to one who was not a party to the contract, and between whom and himself no confidence has been exchanged, he owes no duty which will support an action.

[1] *Bethlehem South Gas & Water Co.* v. *Yader*, 112 Pa. 136.